Supreme Court, U. S.
FILED
DEC 12 1980
MICHAEL RODAK, JR., CLERK

No. 80-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioners,

v.

TRANS WORLD AIRLINES, INC.,
Respondent,

and

ANNE B. ZIPES, PATRICIA A. SANTINI, and PAMELA J. DAILING, individually and on behalf of a class,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM A. JOLLEY
STEVEN A. FEHR
SCOTT A. RAISHER
1300 Traders Bank Building
1125 Grand Avenue
Kansas City, Missouri 64106
Tel: 816-474-1240

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Where a court of appeals has determined that the district court has no subject matter jurisdiction over certain claims, does the district court nonetheless have jurisdiction:

a) to approve a settlement of those same jurisdictionally-defective claims;

b) order that plaintiffs (former employees) be awarded retroactive competitive seniority;

c) order that the provisions of the settlement supersede the collective bargaining agreement between the employer and the union representing the incumbent employees;

all of the above actions being taken over the objection of the collective bargaining representative (union) of such employees?

2. In an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et. seq. by former employees solely against an employer, may a court, pursuant to a settlement of that action, over the objection of the union representing incumbent employees, and absent a finding under § 706(g) of any violation as to such former employees for which there is liability:

a) order that the provisions of the settlement supersede the collective bargaining agreement between the employer and the union by granting full retroactive seniority to those former employees?

b) grant full retroactive competitive seniority to those former employees under the standard enunciated by this Court in *Franks* v. *Bowman Transportation Company, Inc.*, 424 U.S. 747 (1976), where, as distinguished from *Franks*, the Court of Ap-

peals determined such claims to be without merit, and there has been no allegation or determination that the seniority system violates Title VII.

3. Is the remedy of rightful place competitive seniority appropriate:

a) when such relief results in such adverse impact on incumbent employees as, *inter alia*, the likelihood that hundreds of employees who either are now or soon will be on layoff, will never regain their employment and that other employees will be required, in order to retain employment, to relocate at their own expense to other cities;

b) when such relief will impair and dilute further the seniority rights of four distinct groups who themselves have been the victims of unremedied discrimination by the same employer?

PARTIES INVOLVED

Respondent Trans World Airlines, Inc. is a commercial air carrier and defendant in the proceedings below. The individual respondents are class representatives of the plaintiff class which has been divided into two subclasses by the district court. Petitioner Independent Flight Attendants is a labor union representing individuals employed by respondent TWA and was an intervenor in the action below.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Involved	ii
Table of Authorities	vi
Opinions Below	2
Jurisdiction	2
Statutes, Constitutional Provisions And Rules Involved	2
Statement Of The Case	3
A. Background	3
B. The Decision Of The Court Of Appeals	7
REASONS FOR GRANTING THE WRIT	9
I. The Lack Of Jurisdiction Precludes The Action Taken By The District Court	9
A. Importance Of The Issue	9
B. There Is An Acknowledged Conflict Among Circuits	10
C. The Decision Below Has Allowed The Parties To Confer Jurisdiction By Consent Contrary To The Principle Of Limited Subject Matter Jurisdiction	11
D. The Seventh Circuit's Decision Is Contrary To This Court's Decisions In Zahn And Snyder	15
E. In Any Event, The Underlying Jurisdictional Question Is Controlled By Evans	16
II. Absent A Finding Of A Violation Under § 706(g) Of Title VII, It Is Improper To Award Retroactive Seniority Or Supersede The Collective Bargaining Agreement	18

TABLE OF CONTENTS—Continued

	Page
A. The Importance Of The Issue	19
1. The Interaction Between Title VII And Federal Labor Statutes	19
2. The Decision Below Upsets The Balance Between Title VII And The Federal Labor Laws	21
B. There Is A Conflict Among The Circuits	22
C. The Decision Below Is Contrary To Evans	26
III. This Petition Raises An Important Question As To The Appropriateness Of Rightful Place Competitive Seniority In The Face Of An Unusual Adverse Impact On Incumbent Employees	27
CONCLUSION	30
APPENDIX	
Opinion of the Court of Appeals, June 13, 1980	1a
Order of the Court of Appeals Denying Petition for Rehearing, September 17, 1980	11a
Order of the District Court, September 14, 1979	13a
Order Approving Settlement and Dismissing Actions issued by the District Court November 8, 1979	16a
Order Awarding Seniority issued by the District Court November 8, 1979	18a
Amendment to Settlement Agreement	20a
Settlement Agreement	23a
Opinion of the Court of Appeals, August 24, 1978 (Consolidated)	40a
Relevant Excerpts from Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq.	59a

TABLE OF CONTENTS—Continued

Page

Excerpts from Article III of the Constitution of the United States 60a

Rules 82 and 23(e) of the Federal Rules of Civil Procedure 61a

Rule 16(e) of the United States Court of Appeals for the Seventh Circuit 61a

Excerpts from the Collective Bargaining Agreement Between Trans World Airlines, Inc. and the Independent Federation of Flight Attendants, Signed October 11, 1978 ..... 62a

TABLE OF AUTHORITIES

CASES Page

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 17
ALSSA v. *American Airlines*, 455 F.2d 101 (7th Cir. 1972) 3
ALSSA v. *American Airlines*, 490 F.2d 636 (7th Cir. 1973), *cert. den.*, 416 U.S. 993 (1974) 4
ALSSA v. *American Airlines*, 573 F.2d 960 (7th Cir. 1978), *cert. den.*, 439 U.S. 876 (1978) 22, 23
American Fire and Casualty Co. v. *Finn*, 341 U.S. 6 (1951) 12
City of Kenosha, Wisconsin v. *Bruno*, 412 U.S. 507 (1973) 12
In re Consolidated Pretrial Proceedings in the Airline Cases, 17 FEP 1512 (N.D. Ill. 1976) 4
In re Consolidated Pretrial Proceedings in the Airline Cases, 582 F.2d 1142 (7th Cir. 1978) 2, 5, 6, 13, 14, 16, 17
Diaz v. *Pan American Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. den.*, 404 U.S. 950 (1971) .. 28
EEOC v. *AT&T*, 556 F.2d 167 (3rd Cir. 1977), *cert. den.*, 438 U.S. 915 (1978) 24
Emporium Capwell Co. v. *Western Addition Community Organization*, 420 U.S. 50 (1975) 20, 21, 25
Fairfax Countywide Citizens v. *Fairfax County*, 571 F.2d 1299 (4th Cir. 1978), *cert. den.*, 439 U.S. 1047 (1978) 13
Franks v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976) 8, 18, 19, 20, 21, 22, 23, 27, 29
Gaballah v. *Johnson*, —— F.2d ——, 23 FEP 46 (7th Cir. 1980) 15
Hart v. *J. T. Baker Chemical Corp.*, 598 F.2d 829 (3rd Cir. 1979) 17
High v. *Braniff*, 592 F.2d 1330 (5th Cir. 1979) 23, 24
Hinton v. *CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975) 17
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977) 19, 20, 25

TABLE OF AUTHORITIES—Continued

	Page
Jamison v. *Butcher & Sherrerd*, 68 F.R.D. 479 (E.D. Pa. 1975)	13
Laffey v. *Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert. den.*, 434 U.S. 1086 (1978)	17
Meadows v. *Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975)	21
Mitchell v. *Maurer*, 293 U.S. 237 (1934)	12
Myers v. *Gilman Paper Corp.*, 544 F.2d 837, modified 556 F.2d 758 (5th Cir. 1977), *cert. den.*, 434 U.S. 801 (1977)	23
McArthur v. *Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978)	8, 10, 11, 15, 17
McDonald v. *United Air Lines, Inc.*, 587 F.2d 357 (7th Cir. 1978), *cert. den.*, 442 U.S. 934 (1979)	15
McDonnell-Douglas Corp. v. *Green*, 411 U.S. 792 (1973)	17
Patterson v. *Stovall*, 528 F.2d 108 (7th Cir. 1976)	12, 13
Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978)	22
Snyder v. *Harris*, 394 U.S. 332 (1969)	15
Sosna v. *State of Iowa*, 419 U.S. 393 (1975)	12
Southbridge Plastics Division, W. R. Grace and Company v. *Local 759*, 565 F.2d 913 (5th Cir. 1978)	23, 24
Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 (1977)	19, 20, 22, 25
United Airlines, Inc. v. *Evans*, 431 U.S. 553 (1977)	11, 17, 18, 19, 21, 25, 26
United States v. *Boe*, 543 F.2d 151 (C.C.P.A. 1976)	12
U. S. v. *Roadway Express, Inc.*, 457 F.2d 854 (6th Cir. 1972)	24, 25
U. S. v. *Trucking Employers, Inc.*, 561 F.2d 313 (D.C. Cir. 1977)	25
United Steelworkers v. *Weber*, 443 U.S. 193 (1979)	20, 21, 25

TABLE OF AUTHORITIES—Continued

Page

Wetzel v. *Liberty Mutual Insurance Co.*, 508 F.2d 239 (3rd Cir. 1975), *cert. den.*, 421 U.S. 1011 (1975) 17
Zahn v. *International Paper Company*, 414 U.S. 291 (1973) 15, 16

STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

§ 703(h), 42 U.S.C. § 2000-2(h) 2, 20, 25, 26
§ 706(d), 42 U.S.C. § 2000e-5(d) (1970) 2, 5
§ 706(g), 42 U.S.C. § 2000e-5(g) 2, 6, 18, 19, 25

The Railway Labor Act, 45 U.S.C. § 151, *et seq.* 20
The National Labor Relations Act, 29 U.S.C. § 151, *et seq.* 20

CONSTITUTIONAL PROVISIONS

Article III of the Constitution of the United States 2, 10

RULES

Federal Rules of Civil Procedure, Rule 12(h)(3) .. 12
Federal Rules of Civil Procedure, Rule 23(e) .. 2, 14, 15, 16
Federal Rules of Civil Procedure, Rule 82 ..... 2, 15
Rule 16(e) of the United States Court of Appeals for the Seventh Circuit 8

OTHER AUTHORITIES

C. A. Wright, *Law of Federal Courts*, § 7 (West Pub. 3rd Ed. 1976) 10
13 Wright, Miller and Cooper, *Federal Practice and Procedure*, § 3522 (West Pub. 1975) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioners,

v.

TRANS WORLD AIRLINES, INC.,
Respondent,

and

ANNE B. ZIPES, PATRICIA A. SANTINI, and PAMELA J. DAILING, individually and on behalf of a class,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Independent Federation of Flight Attendants ("IFFA"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered June 13, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been officially reported. It is unofficially reported at 23 FEP 118, and a copy appears in the Appendix at pp. 1a-10a. The three relevant orders of the district court have not been published but appear in the Appendix at pp. 13a-19a. This petition also involves a previous opinion by the Court of Appeals in this case which has been reported as *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978), and this opinion appears in the Appendix at pp. 40a-58a. Two other opinions have issued from the Court of appeals during the history of this litigation, and they appear at 490 F.2d 636 and 455 F.2d 101. Previous opinions of the district court have been unofficially reported at 9 FEP 101; 12 FEP 1461; and 17 FEP 1512.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1980. A timely petition for rehearing was filed on June 25, 1980. The petition for rehearing was denied on September 17, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES INVOLVED

This petition involves Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, specifically Section 703(h), 42 U.S.C. § 2000e-2(h); Section 706(d), 42 U.S.C. § 2000e-5(d) (1970); and Section 706(g), 42 U.S.C. § 2000e-5(g). It also involves Article III of the Constitution of the United States, and Rules 82 and 23(e) of the Federal Rules of Civil Procedure. The relevant portions of all of these provisions appear in the Appendix.

STATEMENT OF THE CASE

A. Background

Until October of 1970, respondent Trans World Airlines, Inc. (TWA) maintained a "no-motherhood" policy resulting in the termination of female flight attendants who became mothers. On May 30, 1970, a charge was filed with the Equal Employment Opportunity Commission (EEOC) challenging this practice. This was the first such charge filed. A class-action complaint was filed on August 18, 1970, in the United States District Court of the Northern District of Illinois, alleging that TWA's no-motherhood policy violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and invoking jurisdiction under the same statute. The purported class consisted of all flight attendants terminated on account of motherhood since July 2, 1965 (the effective date of the Act). One of the class representatives was the union then representing TWA's flight attendants, the Air Line Stewards and Stewardesses Association (ALSSA).

In 1971 the class representatives and TWA agreed upon a settlement, which provided, *inter alia*, for the rehiring of each class member with the same amount of seniority held at the time of her termination. The EEOC sought to intervene, presumably for the purposes of blocking the proposed settlement. The district court refused to allow intervention, and the Seventh Circuit affirmed. *ALSSA* v. *American Airlines*, 455 F.2d 101 (7th Cir. 1972).[1]

The district court subsequently approved the settlement. In support of the settlement, counsel for the class, who was also counsel for ALSSA, testified that a major reason for agreeing to the settlement was that most of

---

[1] For several years this case was consolidated with a similar suit against American Airlines.

the class faced a serious legal obstacle to any recovery because they were terminated long before any charge had been filed with the EEOC and had not complied with the Title VII time limits.[2]

Several disenchanted class members appealed. The Seventh Circuit reversed the approval of the settlement because of a conflict it perceived between ALSSA's obligations to the class and to the then-current working flight attendants. The court also directed the ALSSA be replaced as a class representative. *ALSSA* v. *American Airlines*, 490 F.2d 636 (7th Cir. 1973), *cert. den.* 416 U.S. 993 (1974).

Upon remand, the case proceeded on the merits.[3] In 1976 the district court granted summary judgment in favor of the plaintiffs on the issue of liability. *See, In re Consolidated Pretrial Proceedings in the Airline Cases*, 17 FEP 1512 (N.D.Ill. 1976). Judge McGarr found that the "no-motherhood" policy was discriminatory and that the Title VII time limits did not bar the claims of any class members. An interlocutory appeal was taken from this ruling. During the pendency of that appeal (on April 1, 1977), petitioner herein, the independent Federation of Flight Attendants (IFFA) came into existence

---

[2] See, 490 F.2d at 639-640.

[3] On July 22, 1974, another class action was filed on behalf of the same class against TWA and ALSSA. The second suit alleged that the acts of TWA and ALSSA in negotiating the attempted settlement of the first action violated Title VII. The second suit was consolidated with the first action for discovery purposes and has remained quiescent since that time. To this date no rulings have been made on any of the legal issues raised by the second suit; and it has not been mentioned by either the district court or the Seventh Circuit during the events which led to the filing of this *certiorari* petition. Thus, while this explains why many documents from the lower courts are double-captioned, we need not mention the "second suit" again.

and under Railway Labor Act election procedures became the new collective bargaining representative for TWA flight attendants.

In August of 1978 the Seventh Circuit reversed the district court again. *See, In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978).[4] *The Court of Appeals held that the claims of approximately 92% of the purported class are jurisdictionally barred.*[5] These individuals were terminated more than ninety days prior to May 30, 1970, the filing date of the first EEOC charge, and hence could not comply with the time limits in 42 U.S.C. § 2000e-5(d) (1970).[6] The Seventh Circuit concluded that the Title VII time limits are jurisdictional prerequisites which could not be waived, and thus, that there was no subject matter jurisdiction over the claims of the vast majority of the plaintiff-class. Counsel for the class had argued that TWA had waived its time limits defense pursuant to the aborted 1972 settlement agreement. The Seventh Circuit disposed of this argument by stating that since the time limits were jurisdictional prerequisites, they could not be waived pursuant to a settlement. *See*, 582 F.2d at 1151, App. 57a.

After the 1978 Seventh Circuit opinion plaintiffs filed a *certiorari* petition with this Court. *See, Zipes, et al* v. *Trans World Airlines, Inc.*, No. 78-1545. TWA then cross-petitioned. *See, Trans World Airlines, Inc.* v. *Zipes, et al.*, No. 78-1549. The parties thereafter moved to defer consideration of their *certiorari* petitions in order to negotiate a new settlement. This request was granted by the

---

[4] We will refer to this opinion as the *"Consolidated"* opinion. It is reproduced in our Appendix at App. 40a.

[5] All the class representatives were included among the group whose claims are jurisdictionally barred.

[6] The time period is now 180 days. See, 42 U.S.C. § 2000e-5(e).

Court on June 4, 1979, and accordingly those *certiorari* petitions are still pending.

Plaintiffs and TWA reached a new settlement. It establishes two "sub-classes": Sub-Class A, consisting of those individuals whose claims are valid according to the *Consolidated* opinion; and Sub-Class B consisting exclusively of those individuals whose claims are jurisdictionally defective. This settlement requires TWA to pay the sum of three million dollars to the plaintiff class; half to be divided among the members of Sub-Class A and half among the members of Sub-Class B. There are approximately 30 women in Sub-Class A, and 400 women in Sub-Class B.[7] The settlement agreement also requires TWA to offer re-employment to *all* plaintiffs. On the question of retroactive competitive seniority for the returning class members, the settlement agreement provides that the district court "in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law . . ."[8] will determine what, if any, seniority plaintiffs receive.

The settlement agreement purports to override past, present, and future collective bargaining agreements. (XIII, EXCLUSIVITY, App. 36a). The provisions in the settlement regarding determination of seniority are directly contrary to provisions of the current TWA-IFFA collective bargaining agreement. *See* App. 62a.

Upon learning of the new settlement agreement and the resulting likelihood that the agreement, if approved, would cause the return of hundreds of women to the bargaining unit with great amounts of retroactive com-

[7] Thus, pursuant to the new settlement agreements each of the members of Sub-Class B would receive approximately $3,750 (minus costs and attorneys fees) plus the offer of reinstatement with retroactive competitive seniority ranging from ten to thirty years.

[8] The settlement agreement is in the Appendix at App. 23a.

petitive seniority, the current union and petitioner herein, IFFA, intervened and objected to the settlement.

Before the district court, IFFA argued, *inter alia*, that (1) the district court had no subject matter jurisdiction to approve the settlement and grant retroactive competitive seniority since the Seventh Circuit had already determined that there was no subject matter jurisdiction over the claims of the members of Sub-Class B; (2) the settlement agreement could not override the collective bargaining agreement between IFFA and TWA; and (3) under these circumstances the court could not grant retroactive seniority to all plaintiffs.

The district court overruled IFFA's jurisdictional challenge on the grounds that the Seventh Circuit's opinion was not final and therefore was not binding. An evidentiary hearing subsequently was held on the question of impact of the settlement upon the current bargaining unit members. A few weeks after the hearing, the district court signed form orders provided by counsel for the class and counsel for TWA. The orders directed that all members of both Sub-Classes be offered reinstatement with full retroactive competitive seniority, and found that such seniority would not cause unusual adverse impact.

B. The Decision Of The Court Of Appeals

IFFA appealed, but the Seventh Circuit affirmed in an opinion delivered June 13, 1980. (The opinion is attached at App. 1a). Regarding the jurisdictional issue, the Seventh Circuit held that despite its previous ruling regarding the lack of subject matter jurisdiction, the district court nonetheless had jurisdiction to approve a class action settlement and to grant seniority pursuant to that settlement over the objections of IFFA. The court reasoned (1) that the principles favoring settlement required this result; (2) that parties should not be "forced to litigate" a contested issue of subject matter jurisdic-

tion; and (3) that the parties' agreement that the court had jurisdiction for purposes of approving the settlement and granting seniority despite objections of incumbent employees and the union was not "tantamount to an attempt to confer subject matter jurisdiction by consent." App. 8a.

The Seventh Circuit did acknowledge that its opinion was contrary to the holding in *McArthur* v. *Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978). Indeed, before releasing its opinion, the panel which heard the case circulated a draft among all judges on the Seventh Circuit pursuant to a local rule applicable to decisions which will create a conflict with another circuit.[9]

Regarding the propriety of a grant of seniority contrary to the provisions of the collective bargaining agreement, the Seventh Circuit simply said that the district court had not abused its "discretion" and cited *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976). The court further noted that based upon normal hiring rates described in the deposition of TWA Vice President Crombie, TWA would likely be able to absorb all returning class members in less than a year. TWA Vice President Crombie had testified that in a "normal" year, the airline hires between 400-800 flight attendants. However, in the 18 months since this settlement agreement was reached, more than 400 of the active, incumbent flight attendants have been placed on furlough, and no new flight attendants have been hired.[10] Under the terms of the settlement agreement, as interpreted by Mr. Crombie in that same deposition, if and when vacancies arise, returning class members will receive preference because

---

[9] See Seventh Circuit Rule 16(e), App. 61a.

[10] Only part of the facts alleged in this sentence appear in the record, since a major furlough has occurred since the case was presented to the Court of Appeals. We are confident, however, that respondent TWA will stipulate to the accuracy of our statement.

of their greater seniority over any bargaining unit members who are on furlough.

REASONS FOR GRANTING THE WRIT

I. THE LACK OF JURISDICTION PRECLUDES THE ACTION TAKEN BY THE DISTRICT COURT.

A. Importance Of The Issue.

This case presents a classic issue regarding the limited subject matter jurisdiction of the federal courts. The Seventh Circuit first held that there was no subject matter jurisdiction over the claims of more than 92% of the putative class. Later, however, it ruled that the district court nonetheless could approve settlement of those claims and pursuant to that approval grant relief in the form of retroactive competitive seniority to all plaintiffs over the objection of the union representing the incumbent employees and in violation of the collective bargaining agreement between the union and the defendant company.[11] The rationale of the decision is that the finding of no subject matter jurisdiction conceivably could be reversed by the Supreme Court and that the parties should not be "forced against their will" to present the jurisdictional issue before this Court.

Thus, the opinion below holds that judicial policies favoring settlement can allow a court to ignore a lack of subject matter jurisdiction. The court said:

> We do not share the view, under the circumstances of this case, that the parties' agreement is tantamount to an attempt to confer subject matter jurisdiction by consent. (App. 8a).

* * * *

---

[11] Our jurisdictional challenge, of course, relates only to Sub-Class B. The district court could approve settlement of Sub-Class A claims only. See Sub-Section D, *infra*.

> We think the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action. Where, as here, the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement that is otherwise appropriate for district court approval. (App. 9a).

The Seventh Circuit has held that a district court can exercise jurisdiction even though its court of appeals found that there is no jurisdiction because the Supreme Court could hold that the court of appeals is wrong. We find such reasoning to be peculiar and circular at best. More importantly, it runs directly contrary to the historical principle that federal courts are courts of limited jurisdiction.

The importance of this issue goes to the very core of our federal judicial system. Indeed, the principle of limited jurisdiction of the federal courts is, in the words of Professor Wright, one of "first importance."[12] It evolves not from judicial policies (such as the "policy" favoring settlements), but from Article III of the Constitution. The Seventh Circuit's opinion, if allowed to stand, carves a new and dramatic exception to this principle.

B. There Is An Acknowledged Conflict Among Circuits.

The Seventh Circuit acknowledged (App. 9a) that it disagreed with the Fifth Circuit in *McArthur* v. *Southern Airways*, 569 F.2d 276 (5th Cir. 1978) (en banc). *McArthur* involved the district court's approval of a settlement between *Southern Airways* and female flight attendants who alleged that the airline violated Title VII by forbidding the employment of married flight at-

[12] C. A. Wright, *Law of Federal Courts*, § 7 (West Pub. 3rd Ed. 1976).

tendants. Subsequent to the settlement approval, the decision issued in *United Airlines* v. *Evans*, 431 U.S. 553 (1977), which held that "[a] discriminatory act which is not made the basis for a timely charge . . . has no legal consequences" and does not create a continuing violation unless a present violation exists. 431 U.S. at 558.

Upon reading *Evans*, the Fifth Circuit, acting *sua sponte*, found that the district court had no subject matter jurisdiction over the plaintiffs' claims, reversed the settlement approval and dismissed the action.

The conflict between the Fifth and Seventh Circuits is deep, direct, and irreconcilable. Indeed, the Fifth Circuit clearly assumed that it was so obvious that a court which had determined it was lacking subject matter jurisdiction could not approve a settlement that it was not necessary to discuss the issue in any detail. Moreover, in *McArthur*, the determination of lack of jurisdiction came long *after* the approval of the settlement by the district court. The Fifth Circuit still felt compelled to reverse and dismiss due to its perception of a lack of jurisdiction. Here, the Seventh Circuit determined that jurisdiction was lacking prior to the time the parties reached the settlement. Thereafter the parties asked the district court for approval and for an award of seniority. The Seventh Circuit affirmed despite its unchanged finding that jurisdiction was lacking. The Court should grant *certiorari* to resolve this acknowledged conflict between circuits regarding an important issue of subject matter jurisdiction.

C. The Decision Below Has Allowed The Parties To Confer Jurisdiction By Consent Contrary To The Principle Of Limited Subject Matter Jurisdiction.

The Fifth Circuit's decision in *McArthur* is in complete accord with the entire body of case law regarding

subject matter jurisdiction. The Seventh Circuit opinion in this case, by contrast, departs radically from the same legion of cases, and warrants review by this Court. It is hornbook law that parties cannot confer upon a federal court jurisdiction that has not been conferred by the Constitution and Congress. Jurisdiction cannot be provided by stipulation, consent, waiver, or conduct by the parties. *Mitchell* v. *Maurer*, 293 U.S. 237 (1934); *American Fire and Casualty Co.* v. *Finn*, 341 U.S. 6 (1951);[13] *Sosna* v. *State of Iowa*, 419 U.S. 393 (1975). A court, whether trial or appellate, is obliged to inquire *sua sponte* into the jurisdiction of the district court, and to dismiss any claim once it is determined that the court lacks jurisdiction over it. *Mitchell* v. *Maurer*, *supra*; *City of Kenosha, Wisconsin* v. *Bruno*, 412 U.S. 507 (1973). The requirement of dismissal immediately following a determination of lack of jurisdiction also is built into Rule 12(h)(3) of the Federal Rules of Civil Procedure. Simply put, the law is that "the subject matter jurisdiction of the federal courts is too basic a concern to the judicial system to be left to the whims and tactical concerns of the litigants."[14] But it has been so left here.

Prior to the issuance of the opinion from which we petition, there was also no doubt that the concepts of subject matter jurisdiction outlined above also applied to court approval of any consent decrees and/or settlements (class action or otherwise). *See, United States* v. *Boe*, 543 F.2d 151, 157-158 (C.C.P.A. 1976); *Patterson* v. *Stovall*, 528 F.2d 108, 112, n.5 (7th Cir. 1976);

---

[13] We could, of course, cite hundreds of other decisions standing for the principles we discuss here and do not only due to lack of space. We refer the Court generally to the cases cited in 13 Wright, Miller and Cooper, *Federal Practice and Procedure*, § 3522, n. 6-12 (West Pub. 1975).

[14] Wright, Miller and Cooper, supra, § 3522.

Fairfax Countrywide Citizens v. *Fairfax County*, 571 F.2d 1299 (4th Cir. 1978), *cert. den.*, 439 U.S. 1047 (1978); *Jamison* v. *Butcher & Sherrerd*, 68 F.R.D. 479 (E.D. Pa. 1975). In *Patterson*, which was an appeal to the approval of a class action settlement, the Seventh Circuit noted that pursuant to the settlement the defendants had withdrawn their challenge to the court's subject matter jurisdiction but said that, "Despite the withdrawal, the District Court would have no authority to approve the settlement had it lacked jurisdiction." Curiously, *Patterson* was cited with approval in the Seventh Circuit opinion in this case, with no explanation as to how this case requires a different result despite the obvious fact that in *Patterson* the parties had "settled" subject matter jurisdiction just as have the parties here. But there is more. In its prior opinion in this very case the Seventh Circuit held that a settlement could not obviate a lack of subject matter jurisdiction. The plaintiffs argued that TWA had waived its jurisdictional defense pursuant to the aborted 1972 settlement. The Seventh Circuit quickly dismissed this argument, stating:

> Although it is questionable whether any concessions made at a settlement hearing should be held to constitute a waiver when the settlement is subsequently overturned, we need not reach this question as our conclusion that this filing requirement was jurisdictional precludes a finding of waiver. *Consolidated*, *supra*, 582 F.2d at 1151, App. 57a.

Thus, one Seventh Circuit opinion in this case has held that the defendant and alleged wrongdoer cannot waive subject matter jurisdiction pursuant to a settlement agreement. Another has held that innocent third parties to a settlement agreement which violates their rights cannot raise the court's lack of jurisdiction. We respectfully submit that such reasoning is illogical, inequitable and incorrect.

The conclusion that the settlement was not tantamount to conferring jurisdiction by consent is plainly wrong. Consider the course of events: the Seventh Circuit had determined that there was no jurisdiction over hundreds of claims; the parties then agreed upon a settlement over those claims which they asked the district court to approve; pursuant to the settlement they purported to vest in the district court the power, indeed, the jurisdiction to determine and grant seniority to all those individuals whose claims are jurisdictionally barred.

A settlement is, after all, an agreement and a stipulation. Pursuant to this settlement, the parties agreed that the court could issue orders relating to seniority which it otherwise could not because of the prior judicial determination that jurisdiction is lacking. Thus, the only basis for the court's jurisdiction was the consent of the parties.

The remainder of the Seventh Circuit rationale also dissolves because it is not the settlement which has granted seniority, it is the order of the court. *The parties do not need the court to settle; they need the court to grant seniority and supersede the collective bargaining agreement.* Settlement without the court and the Rule 23(e) approval procedures might be more difficult, but it certainly is not impossible. If each plaintiff can be expected to sign a release and endorse a settlement check, surely each plaintiff can be asked to sign an individual settlement agreement. But absent an order of the court, or the consent of the union, plaintiffs cannot obtain a grant of seniority, and that is precisely the point. The parties are not being "forced" to litigate. Instead they are simply faced with a choice of (1) proceeding with this litigation to its conclusion, or (2) settling without infringing upon the seniority rights of innocent incumbent employees.

Perhaps the final absurdity of the two Seventh Circuit opinions is that *Consolidated* is still being cited by

the Seventh Circuit to limit class actions, [*McDonald* v. *United Air Lines, Inc.*, 587 F.2d 357 (7th Cir. 1978), *cert. den.*, 442 U.S. 934 (1979)]; and, to *sua sponte* dismiss claims on appeal for lack of jurisdiction [*Gaballah* v. *Johnson*, —— F.2d ——, 23 FEP 46, 52, n. 11 (7th Cir. 1980)]. Judge Fairchild, who authored the opinion in this case also wrote *Gaballah*, which issued only four days after the decision here. It seems incredible that an opinion in this case can cause dismissal of claims for lack of jurisdiction and preclude settlements in other cases, but not in this case. But that is what has happened.

D. The Seventh Circuit's Decision Is Contrary To This Court's Decisions In Zahn And Snyder.

The Seventh Circuit's opinion stated that this case "may" be distinguishable from the Fifth Circuit in *McArthur*, *supra*, because here the district court had jurisdiction over the claims of individuals numbering about 8% of the putative class, whereas in *McArthur* the claims of all plaintiffs were jurisdictionally defective. This distinction which the court apparently thought about, but declined to make, is in fact without merit under well-established Supreme Court precedent. *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Zahn* v. *International Paper Company*, 414 U.S. 291 (1973). Those cases firmly establish that in a class action under Rule 23 F.R.Civ.P., the court must have jurisdiction over the claim of *each* plaintiff. See also Rule 82 which provides that the Federal Rules of Civil Procedure shall not be construed to extend the jurisdiction of the federal courts. Simply put, the essence of Rule 23 is to provide a procedural mechanism for litigation of claims over which the court has jurisdiction; it does not create jurisdiction.

Thus, jurisdiction over the claims of sub-Class A cannot provide the necessary jurisdiction to allow a court to approve settlement of the claims of Sub-Class B, or to

order that Sub-Class B members be reinstated with retroactive competitive seniority. Such a theory would be a clear violation of the unambiguous statement in *Zahn* that "one plaintiff may not ride in on another's coattails." 414 U.S. at 301. This is precisely the logic the Seventh Circuit applied in *Consolidated* when it directed that the jurisdictionally barred plaintiffs be dismissed. Indeed, clearly if Sub-Class A could provide jurisdiction for Sub-Class B for purposes of settlement approval, it could also provide jurisdiction for the merits of the claims of Sub-Class B.

But what the opinion below has done is to allow a perceived necessity to approve a settlement under Rule 23(e) to take precedence over an unchanged finding of lack of jurisdiction. Insofar as the jurisdiction of the court is concerned, there is no conceivable basis for distinguishing between Rule 23(e) regarding class action settlement approval and the remainder of the Rule regarding maintenance of class actions. Accordingly, the effect of the decision is to allow Rule 23(e) to expand jurisdiction, a result forbidden by the Rules, the case law, and the Constitution. This conflict presents another strong reason why *certiorari* should be granted.

E. In Any Event, The Underlying Jurisdictional Question Is Controlled By Evans.

As discussed above, having found that there was no subject matter jurisdiction over Sub-Class B, the Seventh Circuit was obliged to dismiss those claims and direct the district court not to proceed further. The Seventh Circuit has violated this duty by allowing the district court to approve the settlement and grant seniority. This alone, requires a summary reversal. But there is another, equally simple manner for disposing of this case. This Court, like the Court of Appeals, has the obligation to inquire into the question of the district court's jurisdiction, and if it agrees with the Court of Appeals that ju-

risdiction is lacking, *this* Court must order dismissal of those claims.

We do not believe that there is any real dispute over the nature of the Title VII time limits; this Court has referred to them as jurisdictional prerequisites on several occasions. *See, McDonnell-Douglass Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Evans, supra*, 431 U.S. at 557, n.9. These precedents led the Fifth Circuit in *McArthur* and the Seventh Circuit in *Consolidated* to easily reach the results there. *See also, Hinton* v. *CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239 (3rd Cir. 1975), *cert. den.* 421 U.S. 1011 (1975). We recognize that at least two circuits have stated that this Court did not mean what it said when it referred to the time limits as jurisdictional. *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert. den.*, 434 U.S. 1086 (1978); *Hart* v. *J. T. Baker Chemical Corp.*, 598 F.2d 829 (3rd Cir. 1979). We note, however, that the decision in *Laffey* was pre-*Evans*, and, also, that the decision in *Hart* may be in conflict with the Third Circuit's own decision in *Wetzel*. Moreover, the issue of jurisdiction also did not control the decision in *Hart*, since there the court held that jurisdictional or not, the time limits required dismissal.

Clearly, IFFA has standing to raise this issue because the district court has exercised jurisdiction to override IFFA's collective bargaining agreement and to alter the legitimtate seniority rights of its members. Indeed, pursuant to this settlement TWA is, in effect, asking IFFA's membership to bear the burden of the slight risk that the Seventh Circuit is wrong and that the time limits are not jurisdictional. Under these peculiar circumstances, the time is ripe for this Court to remove whatever doubt may remain regarding the jurisdictional nature of the

Title VII time filing requirements, and any questions regarding the meaning of this Court's decision in *Evans*.

II. ABSENT A FINDING OF A VIOLATION UNDER § 706(g) OF TITLE VII, IT IS IMPROPER TO AWARD RETROACTIVE SENIORITY OR SUPERSEDE THE COLLECTIVE BARGAINING AGREEMENT.

In *Franks* v. *Bowman Transportation Company*, *supra*, this Court established, as a "generally appropriate" remedy for discrimination a grant of retroactive seniority to disadvantaged employees and former employees, absent an unusual adverse impact on incumbent employees from circumstances not generally found in Title VII cases. 424 U.S. at 779, n. 41. Unlike this case, in *Franks* there had been a fully-litigated determination that the employer had violated Title VII and also that the collective bargaining agreement perpetrated that discrimination. 424 U.S. at 751. In *United Air Lines* v. *Evans*, *supra*, this Court noted the limited scope of *Franks*, stating:

> Our decision is *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, does not control this case. *In Franks we held that retroactive seniority was an appropriate remedy to be awarded* under § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) *after an illegal discriminatory act or practice had been proved*, id. at 762-768. When that case reached this Court, the issues relating to the timeliness of the charge and the violation of Title VII had already been decided; we dealt only with a question of remedy. (431 U.S. at 558, 559, emphasis supplied, footnotes omitted).

There is certainly nothing very remarkable in the notion that *Franks* applies only to successful litigants; it follows from the emphasis placed upon the fact that the plaintiffs had "carried their burden." 424 U.S. at 772. That burden has not been carried by plaintiffs who settle, especially plaintiffs who settled after an

appellate court said that their claims are without merit.[15] More importantly, this result flows directly from the clear language of the statute itself. The remedial powers of the district court under § 706(g), 42 U.S.C. § 2000e-5(g), are triggered only "If the court *finds* that the respondent has . . . engaged . . . in an unlawful employment practice." (Emphasis supplied). At the time of settlement, the only finding in effect as to the claims of Sub-Class B was that they are barred by the failure to comply with the jurisdictional time limits.

Despite *Evans*, and despite § 706(g), the opinion below applies the *Franks* standard to a settlement, where, as to Sub-Class B, a violation has been neither admitted nor proven. The issue of whether a § 706(g) finding is a prerequisite to a grant of seniority is of paramount importance; and, as we will discuss below, there exists an irreconcilable conflict among the circuits. This uncertainty in the law, impacting upon incumbent employees throughout this nation, warrants resolution by this Court.

A. The Importance Of The Issue.

1. *The Interaction Between Title VII And Federal Labor Statutes.*

In the development of the remedial scheme of Title VII in the seniority area, both Congress[16] and this Court have consistently recognized the unique status of collective bargaining as being at the core of our national labor policy;[17] the special treatment afforded seniority

---

[15] Our arguments here apply only to Sub-Class B.

[16] See discussion of Congressional record in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 350-352, (1977); and *Franks*, *supra*, 424 U.S. at 759-762.

[17] *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 78-79 (1977).

systems under Title VII itself;[18] and the primary role of the collective bargaining representative, superseding that of minority groups, in the resolution of the many complex problems in the workplace, including discrimination.[19]

Thus, within the last six years, this Court has determined that a neutral seniority system, perpetuating either pre-Act discrimination[20] or post-Act discrimination where no timely charge has been filed pursuant to Sec. 706(d),[21] does not give way to the need for remedy of such discrimination; and that a neutral seniority provision not designed to discriminate is immune from attack or modification under § 703(h), 42 U.S.C. 2000e-2(h).[22] In these decisions involving the interaction between Title VII and federal labor laws (the National Labor Relations Act and the Railway Labor Act),[23] this Court has continually recognized the primacy of collective bargaining. In *Franks*, the Court determined that seniority systems protecting non-victims of discrimination should give way, but only *where a violation of Title VII had been established* and where the seniority system negotiated by the union perpetrated that discrimination.

A logical extension of this line of cases came only last year, in *United Steelworkers* v. *Weber*, 443 U.S. 193

---

[18] *Hardison, ibid.* 432 at 81, 82, citing Sec. 703(h), 42 U.S.C. § 2000e-2(h).

[19] *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975).

[20] *Teamsters, supra.*

[21] *Evans, supra.*

[22] *Hardison, supra.*

[23] In *Teamsters*, the employer and union operated under the provisions of the NLRA, 29 U.S.C. § 151, *et seq.* In *Evans* and *Hardison*, like the instant case, the collective bargaining relationship is governed by the RLA, 45 U.S.C. § 151, *et seq.*

(1979). In *Weber*, even though no violation of Title VII has been judicially established, this Court allowed the Union and employer to voluntarily change the seniority structure, at least temporarily until the effects of past discrimination had been remedied. There the union representing non-victims negotiated and consented to the contractual modifications. Thus, *Weber* keeps intact the essence of *Emporium Capwell* by holding that what cannot be done without the consent of the union can be done with the union's agreement. We note, however, that in *Weber*, despite the consent of the union, Justice Blackmun, in his concurring opinion, still felt compelled to state that the action approved there did not "involve the abrogation of pre-existing seniority rights." 443 U.S. at 215. The opposite is true here.

2. *The Decision Below Upsets The Balance Between Title VII And The Federal Labor Laws.*

Here, unlike *Franks*, no violation of Title VII by seniority system or otherwise has been established and, unlike *Weber*, the union has not consented to intrusion into present employees' seniority rights. The district court nonetheless ordered that the settlement agreement supersede the collective bargaining agreement and that plaintiffs be granted retroactive seniority.[24] The result reached is a significant departure from the principles established by the Court in the cases discussed above.

The unfairness of that result is readily apparent. Unlike payment of money by a party who has violated the law, the burden for a grant of seniority falls squarely upon innocent employees who never discriminated against anyone. *Meadows* v. *Ford Motor Co.*, 510 F.2d 939, 949 (6th Cir. 1975). See also the opinion of Chief Justice

---

[24] The collective bargaining agreement seniority provisions bear a striking similarity to those in *Evans*, *supra*. See, 431 U.S. at 555, n. 6, and the excerpts from the agreement here (App. 62a).

Burger concurring in part and dissenting in part in *Franks*, 424 U.S. at 780. *Franks* does speak of a necessary "sharing of the burden" (424 U.S. at 777), but here the burden falls disproportionately upon innocent incumbent employees who are asked to move over in favor of individuals who cannot prove violations of Title VII entitling them to any rightful place to which they should be allowed to return. Indeed, under this settlement the alleged wrongdoer pays only a tiny fraction of what its ultimate liability would be if plaintiffs succeeded, whereas innocent incumbent employees suffer as much as if plaintiffs finally had prevailed on the merits.

The result of the decision below also perverts the principles enunciated in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978):

> We have never approved a classification that aids persons perceived as members of relatively victimized groups *at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations* . . . .
>
> • • • •
>
> . . . Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. *Without such findings of constitutional or statutory violations it cannot be said that the government has any greater interest in helping one individual than in refraining from helping another.* Thus, the government has no compelling justification for inflicting such harm. (438 U.S. at 307-309, citations and footnote omitted).

See also, Hardison, supra, 432 U.S. at 79, n. 12.

B. There Is A Conflict Among The Circuits.

The Seventh Circuit first faced the problem of subordinating seniority rights in settlements in *ALSSA* v.

American Airlines, 573 F.2d 960 (7th Cir. 1978), *cert. den.* 439 U.S. 876 (1978) (this case is referred to as "*American II*" in the Seventh Circuit opinion in this case). The court upheld a grant of seniority there but cautioned that it would not always be available pursuant to a settlement. See 573 F.2d at 964, n.9. *American II* appeared to set up a sliding scale, case-by-case approach to the applicability of *Franks* to a settlement; plaintiffs there were awarded seniority because they had virtually "earned through full litigation" the *Franks* remedy. In this case, however, Sub-Class B virtually had lost everything through full litigation, and accordingly IFFA argued below that even under *American II* seniority was not appropriate. The Seventh Circuit, however, refused to discuss its own sliding scale *American II* approach, and tersely said that seniority was appropriate, concluding with a quotation from *Franks*. Thus, it appears now that in the Seventh Circuit, Title VII plaintiffs and an employer-defendant may reach a settlement which grants the plaintiffs retroactive competitive seniority, and the union and the incumbent employees are helpless to prevent the concomitant abrogation of their collective bargaining agreement and legitimate seniority rights unless they can demonstrate the "unusual adverse impact" alluded to in *Franks*. The Seventh Circuit is in square and irreconcilable conflict with the Fifth Circuit's view as expressed in at least three cases: *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, modified 556 F.2d 758 (5th Cir. 1977), *cert. denied* 434 U.S. 801 (1977); *Southbridge Plastics Division, W. R. Grace and Company* v. *Local 759*, 565 F.2d 913 (5th Cir. 1978); and *High* v. *Braniff*, 592 F.2d 1330 (5th Cir. 1979).

In *Myers*, the court was faced with the issue of whether a Title VII settlement between a small group of employees and an employer could supersede a collective bargaining agreement between the employer and a union. The court held that it could not, stating that before a

court can grant any relief in a Title VII suit it first must find a violation. Similarly, in *Southbridge*, the Fifth Circuit held that a conciliation agreement between the EEOC and the employer could not override the union's rights under the collective bargaining agreement, since the Company and EEOC had not shown that the seniority system violated Title VII. In *High*, only a small portion of a massive consent decree between the plaintiff-class and the employer was challenged, and again the collective bargaining agreement prevailed. Regarding the portion of the consent decree which ran contrary to the collective bargaining agreement, the court said:

> [t]his portion of the decree lacks the factual underpinnings necessary for its survival as the independent judgment of the court. It was, in fact, a non-censentual consent decree. As such, it cannot stand. 592 F.2d at 1335.

It is clear that in the Fifth Circuit, pursuant to a Title VII settlement between an employer and plaintiff-employees (or would-be employees), a district court can not supersede a collective bargaining agreement and grant seniority to the plaintiffs absent the consent of the union or a fully-litigated judicial determination that discrimination has occurred which requires such action. It is equally clear that in the Seventh Circuit, once the plaintiffs and the employer-defendant have reached a settlement, the union and the incumbent employees are placed in precisely the same position they would be in if the plaintiffs had prevailed on the merits after full litigation. We also call the court's attention to *U.S.* v. *Roadway Express, Inc.*, 457 F.2d 854 (6th Cir. 1972); and *EEOC* v. *AT&T*, 556 F.2d 167 (3rd Cir. 1977), *cert. den.* 438 U.S. 915 (1978). These cases appear to take somewhat of a middle ground between the Fifth and Seventh Circuit positions. *AT&T* is distinguishable since there was no infringement upon competitive seniority and

no clear override of a collective bargaining agreement; it can, however, be read to say that *Franks* may apply even when there is no § 706(g) finding. However, yet another circuit has added the following in an opinion reversing the approval of a class action Title VII settlement:

> The duty of the district court to render a decree which will as far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future, arises only after a judicial determination of discrimination. A court asked to approve a compensation procedure established pursuant to a consent decree in which discrimination is neither admitted or proven is in a fundamentally different position.

U.S. v. *Trucking Employers, Inc.*, 561 F.2d 313, 317, n. 13 (D.C. Cir. 1977). Unfortunately, the court did not say precisely what that "fundamentally different position" is.

Thus, in the four years since *Franks*, at least four[25] circuits have considered rights of a union and incumbent employees pursuant to a Title VII settlement between certain or former employees and an employer. They have reached varying results, and the views of two particular circuits are diametrically opposed. These decisions from the circuits turn not only upon *Franks*, but upon interpretation of other recent cases decided by this Court, such as *Teamsters*, *Evans*, *Weber*, *Hardison* and *Emporium Capwell*. It is therefore appropriate for this Court to exercise its supervisory responsibility and clarify the rights of unions and incumbent employees under Title VII settlements to which they are not parties, and reconcile these rights to the Congressional mandate contained in § 706(g) and § 703(h).

---

[25] *Roadway Express* was decided before *Franks*.

C. The Decision Below Is Contrary To Evans.

Once again, just as we stated in our discussion of the jurisdictional issue, we believe this Court's opinion in *Evans* controls this issue and requires reversal. The relevant holdings in *Evans* are threefold:

1) A discriminatory act not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed, and can be treated as lawful;

2) Absent the timely filing of a charge, the court does not even reach the remedy issue;

3) A challenge to a neutral "seniority system may not be predicated on the mere fact that a past event having no legal significance has affected the calculations of seniority credit, even if the past event might at one time have justified a valid claim against the employer. A *contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. Such a result would contravene the mandate of § 703(h).*" (431 U.S. at 560, emphasis supplied).

Here, no timely charge was filed for Sub-Class B yet the Court bootstrapped the "remedy" question to the settlement, and integrated hundreds of individuals who did not file timely charges into a neutral seniority structure to the detriment of present employees. The fact that the decision here involves a settlement does not diminish the rule in *Evans*. The grant of seniority comes not from the settlement, but from the order of the district court, which was vested with the authority under the settlement to issue orders pursuant to "all applicable provisions of law." The principles of *Evans* are "applicable", and prohibit the result reached here.

III. THIS PETITION RAISES AN IMPORTANT QUESTION AS TO THE APPROPRIATENESS OF RIGHTFUL PLACE COMPETITIVE SENIORITY IN THE FACE OF AN UNUSUAL ADVERSE IMPACT ON INCUMBENT EMPLOYEES.

In *Franks* this Court said that granting seniority is an appropriate remedy absent unusual adverse impact upon incumbent employees not generally found in Title VII cases. Since *Franks*, however, the Court has not explained the circumstances that constitute such unusual adverse impact. The substantial and wide-spread adverse impact on incumbent employees present in this case presents an opportunity for the Court to clarify the meaning of the *Franks* exception.[26]

First, more than 400 flight attendants are presently, and have been since, at least, October, 1979, on layoff. If and when positions reopen, these laid-off flight attendants will pit their seniority (less than two years) against that of returning plaintiffs (minimum of ten years) for such vacancies. Under the settlement agreement, plaintiffs will obtain rights superior to employees on layoff. Present employees not recalled within three years from date of layoff will lose all seniority pursuant to the very contractual seniority system which is being superseded by the district court's order.[27]

Second, many active employees likely will be forced to relocate to another city. The six thousand flight attendants represented by IFFA are all employed by TWA, work out of eleven different domiciles located in seven

---

[26] This issue, though raised by IFFA's pleadings, argument and evidence, was addressed by neither the district court or Seventh Circuit. In our view, this does not render the issue any less important.

[27] See Article 12(F) of the collective bargaining agreement, App. 68a.

different cities from coast to coast, and are covered under a single collective bargaining agreement. If, at any time after plaintiffs have returned to the work force, TWA determines that there are too many flight attendants at a particular domicile, a number of incumbent employees equal to the excess will be forced to relocate by displacement to another domicile; either by moving her home or by commuting, at her own expense. Which employees are forced to relocate will, of course, be determined by seniority, and plaintiffs will again prevail over incumbent employees.

Third, and perhaps more importantly, the settlement agreement imposes on certain victimized employee-classes the burdens occasioned by remedies benefitting a different victimized class. The decision below grants seniority at the expense of other classes of employees themselves victims of TWA's past discriminatory practices. These groups are:

1) *Black Flight Attendants.* Prior to the effective date of Title VII, TWA had employed only four black flight attendants. All 470 black employees now on the seniority list will be lowered in the seniority ladder as a result of the Seventh Circuit decision; of these, 423 (the number hired after the termination of the last returning plaintiffs) will be lowered by the total number of returning plaintiffs;

2) *Male Flight Attendants.* Many airlines, including TWA, refused to hire males as cabin attendants until after 1970. This practice violated Title VII.[28] Included among TWA's current cabin attendants are 673 males, including males rejected for employment specifically because of their sex prior to 1970. All 673 males will be lowered on

---

[28] *Diaz* v. *Pan American Airways*, 442 F.2d 385 (5th Cir. 1971), *cert. den.* 404 U.S. 950 (1971).

the seniority ladder by the grant of retroactive competitive seniority to plaintiffs;

3) *Females Denied Employment by TWA Because of Motherhood.* Prior to 1970, TWA's no-motherhood policy prohibited the hiring of females who *were already* mothers. Included among TWA's present flight attendants are individuals denied employment prior to 1970 for this reason.

4) *Females Who Were Forced to Forego Motherhood as a Condition of Continued Employment.* Those terminated because of the no-motherhood policy were not the only ones who suffered from it; those who chose to forego motherhood to keep their jobs suffered as well. They will suffer again as a result of the return to the bargaining unit of the plaintiffs with retroactive seniority.

Whatever burdens may be required of non-victimized employees in the Title VII remedial scheme, there is a serious question as to the imposition of those burdens on other victimized employees. We urge the Court to grant *certiorari* in order to determine whether the circumstances described above constitute the type of unusual adverse impact contemplated in *Franks.*

CONCLUSION

The writ of *certiorari* should be granted to review the decision of the Seventh Circuit.

Respectfully submitted,

WILLIAM A. JOLLEY
STEVEN A. FEHR
SCOTT A. RAISHER
1300 Traders Bank Building
1125 Grand Avenue
Kansas City, Missouri 64106
Tel: 816-474-1240

Counsel for Petitioner

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 79-2460 and 79-2465

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, *et al.*,
Plaintiffs-Appellees,

v.

TRANS WORLD AIRLINES, INC.,
Defendant,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Intervening Defendant-Appellant,

ANNE B. ZIPES, *et al.*,
Plaintiffs-Appellees,

v.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, *et al.*,
Defendants,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Intervening Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 70-C-2071, 74-C-2063—
STANLEY J. ROSZKOWSKI, *Judge*

Argued February 22, 1980—Decided June 13, 1980

Before FAIRCHILD, *Chief Judge*, SWYGERT and BAUER, *Circuit Judges.*

FAIRCHILD, *Chief Judge.* The issue in this appeal is whether the district court properly approved a settlement agreement terminating almost a decade of litigation regarding the claims of the plaintiffs that defendant TWA's policy between 1965 and 1970 of terminating female flight attendants who became mothers was sex discrimination in violation of plaintiffs' rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The Independent Federation of Flight Attendants (IFFA), the union representing currently employed TWA flight attendants, has intervened in this action and is the appellant here. IFFA asserts that the district court lacked subject matter jurisdiction necessary for it to approve the settlement, that the district court applied an improper standard in approving the settlement including its terms regarding retroactive seniority, and that the settlement violates several statutes. We conclude that the district court acted properly and affirm.

The original complaint in this litigation was filed August 8, 1970. An initial settlement of the class action against the employment practices of American Airlines and TWA was approved by the district court in 1972 but the order was reversed by this court the following year. *Air Line Stewards & Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied sub nom. Air Line Stewards & Stewardesses Ass'n, Local 550* v. *Zipes*, 416 U.S. 993 (1974). American Airlines and the plaintiffs reached a settlement of their dispute and the district court's approval of that settlement was affirmed by this court. *Airline Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960 (7th Cir.) (hereinafter "American Airlines II"), *cert. denied sub nom., Association of Pro-*

fessional Flight Attendants v. *Airline Stewards & Stewardesses Assn., Local 550*, 439 U.S. 876 (1978). In the suit against TWA, the district court entered a summary judgment in favor of all the class members. This court upheld the summary judgment but found that approximately 92% of the plaintiffs' claims were jurisdictionally barred for failure of those plaintiffs to have filed charges of discrimination with the EEOC within 90 days after the alleged unlawful employment practice occurred.[1] The district court's order was vacated and the action remanded to the district court for further proceedings. *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978). The mandate of this court was stayed. Both the plaintiffs' class and TWA filed petitions for *certiorari*; at the request of the petitioners, the Supreme Court on June 4, 1979, granted a motion to defer consideration of the *certiorari* petitions pending completion of settlement proceedings in the district court. The parties arrived at a settlement, for which approval by the district court was required pursuant to Federal Rule of Civil Procedure 23(e), and presented it to the district court in June, 1979. Under its terms women who were discharged or had children within ninety days of the filing of the EEOC charge, or who were reinstated in a ground position and served in that position within the 90-day period, (hereinafter designated Subclass A), shall receive a *pro rata* share of $1.5 million. Another $1.5 million is to be divided among the larger class (Subclass B) who were discharged earlier—the class whose claims this court had found to be jurisdictionally barred. All the women affected by the airline's no-motherhood policy would be offered reemployment and full company seniority, subject to certain conditions. The

---

[1] The 90 day requirement was contained in 42 U.S.C. § 2000e-5(d) (1970). The section has been changed subsequently to extend the time limit to 180 days and was renumbered § 2000e-5(e).

district court was given the power to determine the amount of competitive (union) seniority to grant to each woman. The union representing current TWA personnel who might be affected by this settlement, IFFA, was allowed to intervene to challenge the proposed settlement. The Court held a hearing on objections to the proposed settlement.

The proposal was estimated to create applications for re-employment from 33 members of Subclass A and 172 members of Subclass B. TWA employs in excess of 6,000 flight attendants. A deposition, admitted into evidence at the hearing, of TWA vice president David J. Crombie indicated that in a normal year the airline hires between 400 and 800 new flight attendants.

The district court overruled IFFA's objection to its jurisdiction to consider the proposed settlement and approved the settlement. Regarding jurisdiction, it reasoned that it was not bound by this court's ruling regarding the jurisdictional bar to the claims of Subclass B because of the absence of the issuance of the mandate of this court. The settlement was approved as "fair, reasonable, and adequate for the parties and Subclasses A and B." The court dismissed the action before it and another related action, as proposed by the parties, retaining jurisdiction to determine the question of union seniority, to enforce the terms of the settlement, and to determine attorneys' fees and costs. The district court approved the award of "full restoration of retroactive seniority . . . [as not having] an unusual adverse impact upon currently employed flight attendants in a manner which is not typical of other Title VII cases. . . ."

Federal courts look with great favor upon the voluntary resolution of litigation through settlement. *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, slip op. at 13 (7th Cir. March 4, 1980). This rule has particular force regarding class action law-

suits. *Armstrong* v. *Board of School Directors of the City of Milwaukee*, slip op. at 12 (7th Cir. February 19, 1980). District court approval of a class action settlement is appropriate when the district court finds the settlement to be fair, reasonable, and adequate. *Id.* at 13. Such a determination will be reversed on appeal only upon a "clear showing that the district court abused its discretion." *Id.* at 14 (citing *Dawson* v. *Pastrick*, 600 F.2d 70, 75 (7th Cir. 1979); *E.E.O.C.* v. *American Telephone & Telegraph*, 556 F.2d 167, 174 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

IFFA contends first that the district court lacked subject matter jurisdiction over the claims of Subclass B, as a result of this court's decision in *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978). There does not appear to be any dispute over the district court's jurisdiction over the lawsuit as to Subclass A. Thus IFFA argues that once this court had found subject matter jurisdiction to be lacking as to Subclass B, the district court could not approve a settlement granting any benefit to the members of Subclass B.

We have previously considered and rejected a similar claim in a lawsuit related to this case. In *Airline Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960 (7th Cir. 1978), this court affirmed the district court's approval of a settlement, similar to that involved in the present action, between American Airlines and former flight attendants affected by American's no-motherhood policy. The representative of American's current flight attendants, the Association of Professional Flight Attendants (APFA), as intervenor objected to the settlement on the ground that the court should have determined whether each of the members of the plaintiff class had a claim not time-barred by the EEOC 90-day filing requirement and then refused benefits from the settlement to any class member whose claim was so barred. This court rejected that objection:

> While we believe that in a controverted Title VII case the issues raised by intervenor would be both difficult and interesting, we must recognize that we are here reviewing the propriety of a settlement and not a judgment rendered after a trial. We believe that the issues raised by the intervenor should not be decided on the basis of Title VII law, but rather must be decided on the basis of legal principles regulating judicial review of settlement agreements.
>
> . . . . .
>
> [S]ettlements are entered into because of "the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense . . . ." *Florida Trailer & Equipment Co.* v. *Deal*, 284 F.2d 567, 571 (5th Cir. 1960). Based on these considerations, this court has held that a district court in reviewing a settlement agreement "should not attempt to decide the merits of the controversy . . . [because] [a]ny virtue which may reside in a compromise is based upon doing away with the effect of such a decision." *Patterson* v. *Stovall*, 528 F.2d 108, 114 (7th Cir. 1976). 573 F.2d at 963.

There are clearly some differences between the situation in *American Airlines II* and that presently before us. In the earlier case, a determination about jurisdiction as to each plaintiff would have required the district court to hold "in excess of 100 mini-trials," a process so time-consuming that the benefit of speedy resolution of a dispute provided by a settlement would have been eliminated. In the present case, barring relief to all the members of Subclass B would be a much simpler and less time-consuming task for the district court. In *American Airlines II*, the settlement avoided litigation of the jurisdictional question. Here, that issue has already been litigated in the district and appeals court.

The overriding principle behind the decision in *American Airlines II* is, nevertheless, equally applicable here. There is a crucial issue, that of jurisdiction as to Subclass B, which has not been finally determined because a challenge to our decision is still pending before the United States Supreme Court. Both parties to the settlement believed it in their interests to approve the settlement rather than await the action of the Supreme Court. Not only does their compromise reflect their perception that the ultimate resolution of this issue could not be predicted with certainty, but prior case law also left the law on this matter open to question.

The Supreme Court has not decided whether the time requirements for filing charges with the EEOC define the courts' subject matter jurisdiction as this court has held, or whether the filing requirement should be treated as a statute of limitation, in which case the doctrines of waiver and estoppel would apply. The courts of appeals are split on this issue.[2] The uncertainty of the outcome

---

[2] Several courts have found compliance with the time requirement for filing charges of Title VII violations to be a jurisdictional prerequisite. *In Re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978) ("[W]e find nothing of significance to indicate that the 90-day filing requirement is not jurisdictional." *Id.* at 1151); *McArthur* v. *Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978) (*en banc*) ("Since no plaintiff in this cause made a timely filing with the Equal Employment Opportunity Commission (EEOC), the district court should have dismissed this cause for lack of jurisdiction." *Id.* at 277); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) ("[T]he timely filing requirements with respect to EEOC appears to be a jurisdictional prerequisite to court action under Title VII." *Id.* at 246 (quoting *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 986 (D.C. Cir. 1973)); *Hinton* v. *CPC International, Inc.*, 520 F.2d 1312, 1315 (8th Cir. 1975).

Other courts of appeal have treated the requirement as a statute of limitations subject to equitable considerations. *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978), ("[T]he time provisions of Title VII are subject to equitable modification. Nothing in the legislative history

on this issue before the Supreme Court was considered by the district court to be a major factor leading the parties to reach this settlement, to avoid "the plaintiff class and T.W.A. being forced against their will to continue a legal battle before the Supreme Court in a winner-take-all contest which neither party desires to risk." Slip op. at 3 (N.D. Ill., Sept. 14, 1979). We do not share the view, under the circumstances of this case, that the parties' agreement is tantamount to an attempt to confer subject matter jurisdiction by consent.

Intervenors urge that this court reverse the approval of the settlement order on the basis of the Fifth Circuit's ruling in *McArthur* v. *Southern Airways*, 569 F.2d 276 (5th Cir. 1978) (*en banc*). *McArthur* involved the district court's approval of a settlement between *Southern Airways* and female flight attendants who alleged that the airline violated Title VII as a result of policies forbidding the employment of married or pregnant stewardesses. Subsequent to the settlement approval, 404 F. Supp. 508 (N.D. Ga. 1975), the United States Supreme Court decided *United Air Lines* v. *Evans*, 431 U.S. 553 (1977), which held that "[a] discriminatory act which is not made the basis for a timely charge . . . has no legal consequences" and does not create a continuing violation unless a present violation exists. *Id.* at 558. Because no plaintiff in *McArthur* had made a timely filing with the EEOC nor were there continuing violations under the *Evans* standard, the court of appeals reversed the settlement approval on the ground that the district court had lacked jurisdiction oved the action and therefore had no authority to approve the settlement. 569 F.2d at 277.

The instant action may be distinguishable from *McArthur*. In *McArthur* there was found to be no subject

---

compels us to treat those provisions as jurisdictional." *Id.* at 475); *Hart* v. *J. T. Baker Chemical Corp.*, 598 F.2d 829 (3d Cir. 1979) ([T]he 180-day period is not jurisdictional." *Id.* at 831).

matter jurisdiction at the time of approval of the settlement but here the district court clearly had subject matter jurisdiction over the claims of eight per cent of the plaintiff class. In any event, we decline to adopt the *McArthur* rule.[3] We think the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action. Where, as here, the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement that is otherwise appropriate for district court approval.

In deciding whether the proposed settlement was "fair, reasonable and adequate," the district court was required to consider whether the class members were properly represented by their representatives. The settlement granted significant awards of money, job reinstatement, and seniority to members of the class, none of whose members have made any objection to the settlement. The court also was required to consider the effects of the settlement on the interests of the public as a whole and upon other parties such as the intervenors in this action. We have been presented with no argument that this settlement harms the public as a whole and we note that the settlement serves the public policy of remedying past acts of sex discrimination and the consequences of those past acts. The court recognized the right of the intervenor to present its objections to the court before it would decide whether to approve the proposed settlement. *American Airlines II*, 573 F.2d at 961. The right to have its objections heard does not, of course, give the intervenor the right to block any settlement to which it objects. The district court was presented with a settlement proposal including reinstatement rights for class

[3] This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the question of our declining to follow *McArthur*.

members numbering about three per cent of the total flight attendants represented by IFFA. Testimony indicated that providing positions for these reinstated attendants would normally be possible as a result of normal attrition of workers in less than half a year. The agreement provided that no currently employed attendant would be required to lose employment in order to accommodate a reinstated attendant. The Supreme Court in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) held that granting of retroactive seniority is ordinarily appropriate in Title VII cases:

> [D]istrict courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases. *Id.* at 780.

The district court found that full restoration of union seniority to reinstated class members would not have an unusual adverse impact on currently employed flight attendants.

Examining the district court's actions in approving the settlement agreement and in granting retroactive seniority, we find no abuse of discretion. We have considered the other arguments made by the appellant and find them to be without merit.

The judgment appealed from is AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 17, 1980

[Received Sep. 20, 1980, Goghlan, Joyce and Nellis]

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

Nos. 79-2460 & 2465

AIRLINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, *et al.*,
Plaintiffs-Appellees,

vs.

TRANS WORLD AIRLINES, INC., *et al.*,
Defendants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 70-C-2071, 74-C-2063—
STANLEY J. ROSZKOWSKI, *Judge*

ORDER

Treating the "Petition for Rehearing *In Banc*" as a petition for rehearing under Rule 40, F.R.A.P., the members of the original panel having voted to DENY,

Treating the petition as a suggestion for rehearing *in banc* under Rule 35, F.R.A.P., no judge in regular, active service having requested a vote thereon,

Accordingly, IT IS ORDERED that the petition for rehearing *in banc* is hereby, DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, PAMELA DAILING, SADIE SUE LAKE, PAT SANTINI, VIRGINIA HIRT and BONNIE YODER,

Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

---

74 C 2063

ANNE B. ZIPES, FRANCIS M. SWIFT, *et al.*,

Plaintiffs,

vs.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,

Defendants.

ORDER

Union-Intervenor's objection to this court's jurisdiction and authority to approve the proposed settlement agreement is hereby overruled. The crux of the Union's argument is that the recent Seventh Circuit opinion entered in this litigation and entitled *In Re Consolidated Pretrial*

Proceedings, 582 F.2d 1142 (7th Cir. 1979), wherein the court held that the claims of all members of Subclass B were jurisdictionally defective, represents a litigated final judgment in this case which is legally binding on this court. Thus, applying the jurisdictional portion of the *Consolidated* decision to the case at bar, the Union contends that this court is without authority to exercise its discretion in deciding whether to approve that part of the proposed settlement agreement which allows for an award of accrued and/or retroactive "competitive" seniortiy to members of Subclass B.

For the reasons stated below, the court finds that the *Consolidated* decision does not serve to bar this court from exercising its authority over those portions of the proposed settlement agreement pertaining to members of Subclass B.

A federal appellate court opinion has no legal relevance or impact upon lower court proceedings until it ripens into a final judgment formally communicated to the district court through the issuance of the court of appeals' mandate and opinion in accordance with Rule 41 (a), F.R.A.P. *Bailey* v. *Henslee*, 309 F.2d 840 (8th Cir. 1962), *see also*, *Alphin* v. *Henson*, 552 F.2d 1033 (4th Cir. 1977), wherein the court held that prior to the issuance of its mandate a court of appeals' decision was not final and could be amended to conform to then existing law.

Significantly, no Seventh Circuit mandate has issued in the *Consolidated* appeal as to the plaintiff class members.[1] Pursuant to the provisions of Rule 41(b), F.R.A.P., the plaintiff class requested and was granted a stay of mandate pending final disposition by the Su-

---

[1] Although the court of appeals mandate has issued as to defendant T.W.A., that does not "finalize" those portions of the opinion relating to the claims of the Subclass B members.

preme Court of its petition for certiorari.[2] Contrary to the Union's assertion, the filing of the *Consolidated* opinion with the Clerk of the Seventh Circuit does not constitute a final judgment order, and this court is therefore not presently forbidden from exercising its jurisdiction over the claims of Subclass B members. To paraphrase Mr. Justice Stevens in *United Airlines* v. *Evans*, 431 U.S. 533 (1977), the mere entry of the *Consolidated* decision is an event from which no legal consequences flow until such time as the requisite mandate issues.

The court's decision today is further supported by the fact that the legal effect of a stay of mandate is to maintain and continue the status quo between the parties to the appeal. *Algonquin Gas Trans. Co.* v. *Township of Bernards*, 112 F.Supp. 86, 90 (D.C. N.J. 1953). That is to say that neither party can reap any benefit nor incur any legal detriment as a result of the decision until the mandate issues. Implicit in the maintenance of the status quo is the judicial recognition that the parties to the controversy are free to settle their differences prior to the issuance of the mandate. To hold differently would result in the plaintiff class and T.W.A. being forced against their will to continue a legal battle before the Supreme Court in a winner-take-all contest which neither party desires to risk. Such a harsh result certainly can not be intended by the court of appeals when the stay of mandate is granted.

The remaining objections raised by the Union address themselves to the merits of the proposed settlement agreement and need not be considered at this time.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge

Dated: Sep. 14, 1979

---

[2] Per order dated June 4, 1979, the Supreme Court deferred consideration of plaintiff class' certiorari petition pending approval of the proposed settlement agreement.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, *et al.*,

Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

No. 74 C 2063

ANNE B. ZIPES, *et al.*,

Plaintiffs,

v.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,

Defendants.

ORDER APPROVING SETTLEMENT AND DISMISSING ACTIONS

The court has considered the proposed Settlement Agreement, as amended, for the compromise of these actions and has considered the written and oral presentations of the parties under Rule 23(e), F.R.C.P. The court finds that proper notice of the proposed settlement

and the hearings thereon was given to the members of plaintiff class and Subclasses A and B; and that no class member objected to the settlement. The court also finds that the settlement agreement is fair, reasonable, and adequate for the parties and Subclasses A and B.

Accordingly, it is ordered, that the Settlement Agreement, as amended, is approved and the actions are dismissed. The court finds, pursuant to Rule 54(b), F.R.C.P., that no just reason exists to delay enforcement of or appeal from this Order.

The court retains jurisdiction:

(a) to determine the total amount of seniority and credit for length of service (both accrued and retroactive) for re-employed class members as provided in Section V B of the Settlement Agreement as amended,

(b) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order,

(c) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of eligibility of class members, and

(d) to determine the amounts of attorneys' fees and reimbursement of costs and expenses which may be awarded to plaintiffs' lawyers and the representatives of the class.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge
United States District Court

Dated November 8, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, *et al.*,

Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

No. 74 C 2063

ANNE B. ZIPES, *et al.*,

Plaintiffs,

v.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, and TRANS WORLD AIRLINES, INC.,

Defendants.

ORDER AWARDING SENIORITY

The court having considered the evidence, testimony and briefs which have been submitted in connection with the issue of seniority, pursuant to Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) and Section V of the Settlement Agreement, as amended, and the court finding that full restoration of retroactive seniority will not have an unusual adverse impact upon

currently employed flight attendants in a manner which is not typical of other Title VII cases, it is ordered that each class member who is now employed as a TWA flight attendant or who will hereafter become employed as a flight attendant by TWA under the Settlement Agreement shall be credited with the amount of union (occupational) seniority to which she was entitled on the date on which her employment was terminated, plus credit for such seniority for the "compensation period", as defined in the Settlement Agreement (at page 3), less the deductions provided therein (at p. 8), the terms of which are incorporated by reference and are adopted as part of this Order.

The court having approved the Settlement Agreement in a separate order, it is ordered that this case be, and is hereby, dismissed. The court finds, pursuant to Rule 54(b), F.R.C.P., that no just reason exists to delay enforcement of or appeal from this Order.

However, this court hereby retains jurisdiction:

(a) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order,

(b) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of any eligibility of class members, and

(d) to determine the amounts of attorneys' fees and reimbursement of costs and expenses which may be awarded to plaintiffs' lawyers and the representatives of the class.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge
United States District Court

Dated Nov. 8, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, PAMELA DAILING, SADIE SUE LAKE, PAT SANTINI, VIRGINIA HIRT and BONNIE YODER,

Plaintiffs,

vs.

TRANS WORLD AIRLINES, INC.,

Defendant.

No. 74 C 2063

ANNE B. ZIPES, FRANCES M. SWIFT, *et al.*,

Plaintiffs,

vs.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,

Defendants.

AMENDMENT TO SETTLEMENT AGREEMENT

The Settlement Agreement which has been heretofore entered into between Trans World Airlines, Inc., and the undersigned representatives of the class is hereby amended as follows:

Section V.B shall provide as follows:

It is agreed that the total amount of seniority and credit for length of service (both accrued and retroactive) for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA. The Court's determination will be applied retroactively for all class members who are re-employed after the date of this Agreement but prior to said determination. The class representatives and their attorneys agree and covenant diligently to present to the Court the questions and issues involved in the Court's determination of seniority and credit for length of service within a reasonable time after the entry of an order approving the settlement.

Dated this 22 day of August, 1979.

/s/ Anne B. Zipes
ANNE B. ZIPES
Individually and on behalf of
the Plaintiff Class

Dated this 17 day of August, 1979.

/s/ Pat Santini
PAT SANTINI
Individually and on behalf of
the Plaintiff Class

Dated this 22nd day of August, 1979.

GARDNER, CARTON & DOUGLAS,
Attorneys for
TRANS WORLD AIRLINES, INC.

BY: /s/ Laurence A. Carton
LAURENCE A. CARTON
On behalf of
Trans World Airlines, Inc.

/s/ Kevin M. Forde
KEVIN M. FORDE
One of the Attorneys for
Sub-Class A

/s/ Aram A. Hartunian
ARAM A. HARTUNIAN
One of the Attorneys for
Sub-Class B

KEVIN M. FORDE, ESQ.
111 West Washington Street
Chicago, Illinois 60603

PRESSMAN & HARTUNIAN, CHTD.
Suite 4005
55 East Monroe Street
Chicago, Illinois 60603
(312) 372-6475

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, PAMELA DAILING, SADIE SUE LAKE, PAT SANTINI, VIRGINIA HIRT and BONNIE YODER,

Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

No. 74 C 2063

ANNE B. ZIPES, FRANCES M. SWIFT, *et al.*,

Plaintiffs,

v.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,

Defendants.

SETTLEMENT AGREEMENT

I. DEFINITIONS

Os used herein, the following words and phrases shall have the following meanings:

"Lawsuits" shall mean the cases listed in the caption of this Settlement Agreement.

"Hostess" shall mean a female flight cabin attendant.

"Class" shall include those persons who have comprised the class as heretofore defined in Orders which have been entered in Case No. 70 C 2071 on July 16, 1971, September 16, 1974 and October 10, 1974 and who have not previously opted out under Rule 23(c)(2)(A), F.R.C.P. In the event that the Court enters an Order which creates two or more subclasses, the word "class" shall include all of the persons who comprise the subclasses. For the purposes of this Agreement, the Class is treated as consisting of two sub-classes as delineated in the opinion of the U.S. Court of Appeals for the Seventh Circuit in *In Re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142 (7th Cir. 1978).

"Class Group A" shall mean: (1) those persons who were terminated as TWA hostesses on account of pregnancy or the adoption of a child, *and* the pregnancy ended or the adoption occurred on or after March 2, 1970, and (2) those persons who were terminated as TWA hostesses on or after July 2, 1965 on account of pregnancy or the adoption of a child, *and* the pregnancy ended or the adoption occurred prior to March 2, 1970 but who were thereafter reinstated in ground duty positions, *and* who continued their employment as ground personnel continuously until on or after March 2, 1970.

"Class Group B" shall mean those persons who are members of class Group A, who were terminated as hostesses by TWA on or after July 2, 1965 on account of pregnancy or the adoption of a child *and* the pregnancy ended or the adoption occurred prior to March 2, 1970.

"Terminated" shall mean fired or forced to resign.

"Compensation Period" shall mean the period of time which commenced upon the termination of a

class member's employment and ends on the date on which this Settlement Agreement is signed by TWA but it does not include any period after the beginning of re-employment for which TWA offered or granted reinstatement as a hostess with full pay, seniority and credit for length of service retroactive to the time when she was ready, willing and able to resume working as a hostess.

"Final Order Date" shall mean the date on which the order described in Section X becomes final and no longer subject to court review.

II. This Agreement is entered into between Trans World Airlines, Inc. (hereinafter referred to as "TWA") and the undersigned representatives of the class for the purpose of compromising, settling and terminating all litigation of the lawsuits (including, but not limited to, the petitions for writs of certiorari now pending in U.S. Supreme Court, docket numbers 78-1545 and 78-1549) and putting finally to rest all of the claims, issues and questions of fact and law which have or might have been raised on the facts alleged in the pleadings.

The parties hereto agree that the execution of this Agreement by TWA is not and shall not be construed as an admission by it or deemed to be evidence of the validity of any such claims or its liability for any such claims or of any unlawful acts by it whatsoever, nor shall this Agreement or any of the terms hereof be offered or received in evidence in any civil or administrative action or proceeding as an indication of wrongdoing by TWA or of its legal position in this or other litigation. TWA expressly disclaims any liability in these lawsuits and states that it is entering into this Agreement to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation.

III. SETTLEMENT BENEFITS TO BE OBTAINED BY CLASS MEMBERS

In consideration of the execution of the Release described herein and in consideration of the dismissal of these lawsuits against TWA in all respects (except, possibly, as to the matters referred to in Section V.B), TWA hereby covenants and agrees to do the things and perform the acts described herein, at the times and in the manners set forth in this Agreement, all of which shall be subject to the conditions set forth herein.

A. TWA will pay to the Class the aggregate amount of Three Million dollars ($3,000,000), as follows:

1. TWA will pay to Class Group A the sum of One Million Five Hundred Thousand Dollars ($1,500,000);

2. TWA will pay to Class Group B the sum of One Million Five Hundred Thousand Dollars ($1,500,000).

After deduction therefrom of all amounts awarded by the Court for plaintiffs' attorneys' fees, costs and expenses of litigation, the net amount will be prorated among the class members as provided in Section IV hereof. TWA has no responsibility concerning the calculations or allocations of the total amount among the class members or for fees, costs and expenses.

B. TWA will re-employ as hostesses all class members who are ready, willing and qualified (as defined in Sections VI and IX) to perform the duties required in such re-employment. Any class member who is not either ready, willing or qualified (as defined in Sections VI and IX) for re-employment shall receive from TWA the trip passes described in Section VII.

C. All re-employed class members shall have, be credited with and enjoy the amount of seniority and credit for length of service as is provided in Section V hereof.

D. TWA will have no monetary or other obligation to any member of the class or to any representative or attorney for the class unless expressly provided in this Agreement.

IV. PAYMENT OF MONEY

TWA will distribute to each member of the class the money payment described in Section IIIA hereof no later than thirty (30) days following the Final Order Date or the date when the class representatives furnish to TWA the calculation for each class member as provided hereinafter, whichever last occurs; provided further, however, that if by that time the Court has not determined the total amounts of attorneys' fees and expenses, TWA will have until thirty (30) days following said determination in which to make the payments to class members. Upon such distribution, TWA will provide each class member with a copy of the calculation regarding her payment and will certify to the Court and the attorneys for the plaintiffs that all required payments have been duly made. TWA's obligation to make employer's F.I.C.A. contributions will be in addition to and independent of the terms of this Agreement.

CLASS GROUP A

Distribution of the money paid hereunder to the members of Class Group A shall be made on a pro-rata percentage basis to each member thereof calculated as follows. The amount of base pay which each class member would have earned during the compensation period (except for periods of disability as described in Section

V.A) shall be reduced by her actual gross earnings during the compensation period. The percentage which each member's resulting amount bears to the total thus calculated for all members of Class Group A shall then be applied to the settlement proceeds as calculated pursuant to Section III.A above and she shall receive the amount calculated thereby, less all appropriate deductions as provided above. For example, if the total net earnings thus calculated to have been "lost" by the entire Class Group A during the compensation period is $10,000,000, and a member's net loss of earnings is $50,000, she will receive one-half of one percent of the net settlement proceeds payable to Class Group A. The relevant facts and data will be gathered and utilized under the Court's supervision and direction.

Unclaimed or unpaid funds, if any, shall be distributed as the Court may direct.

CLASS GROUP B

Distribution of the money paid hereunder to the members of Class Group B shall be made on a pro-rata percentage basis to each member thereof calculated as follows. The amount of base pay which each class member would have earned during the compensation period (except for periods of disability as described in Section V.A) shall be reduced by her actual gross earnings during the compensation period. The percentage which each member's resulting amount bears to the total thus calculated for all members of Class Group B shall then be applied to the settlement proceeds as calculated pursuant to Section IIIA above and she shall receive the amount calculated thereby, less all appropriate deductions as provided above. For example, if the total net earnings thus calculated to have been "lost" by the entire Class Group B during the compensation period is $10,000,000, and a member's net loss of earnings is $50,000, she will receive

one-half of one percent of the net settlement proceeds payable to Class Group B. The relevant facts and data will be gathered and utilized under the Court's supervision and direction.

Unclaimed or unpaid funds, if any, shall be distributed as the Court may direct.

V. SENIORITY AND CREDIT FOR LENGTH OF SERVICE

A. Each re-employed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated plus company seniority and such length of service for the entire compensation period, except for those periods of time during which she was disabled from working by reason of pregnancy or otherwise. For each pregnancy which terminated in the birth of a child, the period of disability shall be deemed to be nine (9) months. In the event pregnancy was terminated other than by the birth of a child, the period of disability shall be deemed to be the number of weeks of the pregnancy.

B. TWA agrees with the class that the class members who will be re-employed shall be restored to full occupational (union) seniority and credit for length of service to the same extent as is provided in Section V.A above. However, in the event of the timely objection of any interested person, it is agreed that the amount of seniority and credit for length of service for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA. The Court's award of seniority and credit for length of service will be added to each class member's seniority and credit for length of service to

which she was entitled at the time her employment was terminated. The Court's determination will be applied retroactively for all class members who are re-employed after the date of this Agreement but prior to said determination. The class representatives and their attorneys agree and covenant diligently to present to the Court the questions and issues involved in the Court's determination of seniority and credit for length of service within a reasonable time after the entry of an order approving the settlement.

VI. ELIGIBILITY FOR RE-EMPLOYMENT

TWA agrees to offer: (1) flight attendant retraining to all class members and (2) re-employment as flight attendants to those class members who satisfactorily complete such retraining. TWA will provide retraining classes, the last of which shall commence prior to the expiration of one (1) year following the Final Order Date. TWA will have no obligation to retrain or re-employ any class member following the end of such one (1) year period if such class member has either not qualified for such retraining or re-employment, has elected not to participate in such retraining or has elected not to accept such re-employment during such one (1) year period. TWA will not discriminate in any way against any class member by virtue of the fact that she is a class member or adopt or enforce any employment practice, condition or qualification which operates to discriminate against any class member as such. A class member shall be eligible for re-employment if she fulfills TWA's physical requirements (reasonably applied), medical examination, completion of retraining, and timely files the following described Re-Employment Application; provided, however, that no class member shall be eligible for re-employment who has been re-employed after June 1, 1972 who has been terminated for cause or who has resigned under

circumstances which reasonably do not entitle her to be re-employed.

Each class member who desires re-employment shall in writing so indicate by providing the following information on a Re-Employment Application form to be prepared and distributed by plaintiffs' attorneys:

A. Current full name, name as of termination, social security number, and former TWA employee number

B. Home address and mailing address, including zip code

C. The last TWA base at which she was employed.

D. Approximate date on which she was last employed by TWA

E. Preferences concerning location of new home base

F. The inclusive dates of each full-term and partial-term pregnancy and all other periods of disability.

G. Financial information necessary for the calculation described in Section IV

Each class member desiring re-employment shall forward the said form to the attorneys for the plaintiffs, who shall then keep one copy for retention in their files and forward one copy to TWA. No class member shall be entitled to re-employment under this Agreement unless she completes and returns the aforesaid form to the attorneys for the plaintiffs within sixty (60) days after the date of the commencement of the hearing described in Section X; provided, however that in the case of any person who is (a) named in the list of class

members attached hereto but who does not receive notification of her rights because of an incorrect mailing address or (b) not named in the aforesaid list but who demonstrates diligence and entitlement to class membership, the deadline for filing the aforesaid form shall be 30 days prior to the commencement of TWA's last retraining class.

Within thirty (30) days after entry by the Court of an order (if any) determining the matters described in Section V.B, or within thirty (30) days expiration of the deadline for filing the Re-Employment Application, whichever is later, TWA shall prepare a special list showing the adjusted seniority date of each class member who has applied for re-employment, one copy of which shall be supplied to the attorneys for the class representatives. Each class member's Re-Employment Application shall be acknowledged in writing by TWA by certified mail, addressed to the class member, advising her of her adjusted seniority date.

VII. TRIP PASSES FOR NON-RETURNING CLASS MEMBERS

Each class member who does not become re-employed shall be entitled to receive twelve (12) trip passes for use at any time or times during her lifetime. Each trip pass shall be good for travel on TWA for herself, her spouse or her child (provided that the child is (a) a dependent for IRS purposes and (b) is either under 21 or is a full time student under 23) from origin, point to destination and return to point of origin with enroute stopover privileges. The trip passes will be of the same priority class as trip passes for retired TWA hostesses (Class 9); provided, however, that such retired hostesses and other retired persons utilizing Class 9 passes shall have higher boarding priority.

VIII. IDENTIFICATION OF THE CLASS MEMBERS

The parties hereto agree that the list of class members attached hereto contains the names and last known addresses of all persons known by either side to be entitled to membership in the Plaintiff Class. In the event any person not listed on the attached list of class members files with the Court (together with service of a copy on the attorneys for the class representatives and the attorneys for TWA) a sworn petition setting forth sufficient facts to demonstrate diligence and entitlement to membership in the class, upon approval by the Court of said petition the person thus asserting class membership shall be entitled to all of the rights and benefits of this Agreement which are then reasonably available.

IX. RE-EMPLOYMENT PROCEDURES

For the purpose of retraining applicants for re-employment, TWA will conduct retraining classes. TWA will notify each applicant for re-employment (in writing, giving at least thirty (30) days' advance notice) of the commencement date of the retraining class which she is to attend. If the applicant fails within fifteen (15) days after the date of the notice either to accept the offer or provide a reasonable excuse for not accepting, she will forfeit her right to re-employment under this Agreement. Failure to accept any subsequent offer shall forfeit her right to re-employment unless it is due to temporary physical disability or other personal hardship; provided, however, any applicant who is excused from attending a retraining class because of personal hardship shall not accrue seniority for any purpose during the period beginning with the first day of the retraining class from which she was excused and ending on the first day of the retraining class which the applicant eventually successfully completes. Any class member who fails to meet the

criteria described herein shall be ineligible to attend that class and she shall have sixty (60) days thereafter within which to meet the criteria. If she is deemed to have failed the medical examination, she may object to the determination made by the company doctor and obtain review thereof by petition to this Court, filed within sixty (60) days after receipt by her of TWA's written advice thereof.

Any class member who has been designated to attend the last retraining class to be conducted by TWA hereunder shall meet its weight standards and other qualifications no later than the first day of such retraining class or forfeit all rights of re-employment hereunder. All class members who have not accepted retraining for any reason prior to the last retraining class must accept retraining in such class or otherwise forfeit all rights of re-employment hereunder.

Each class member who successfully completes retraining will be permitted to select assignment to a flight attendant base (or bases), of her choice, at which a vacancy exists, provided that no flight attendant having greater seniority desires to fill such vacancy. If a class member is unable to obtain a base assignment which she desires, she will be assigned to fill a vacancy at any base selected by TWA.

Upon resumption of duties as hostess, each class member shall be provided with the required basic uniforms at TWA's expense.

X. SETTLEMENT PROCEDURES

This Settlement Agreement shall be submitted to the Court for its preliminary approval. If the Court grants preliminary approval and deems it a fit and proper Agreement for submission to the procedures described in Rule 23(e), F.R.C.P., plaintiffs' attorneys will draft all

orders, notices and other papers necessary for compliance with the orders and directions of the Court and for the implementation of the procedures required under Rule 23, F.R.C.P., including a proposed form of notice to class members. All such papers shall be submitted to the attorneys for TWA at a reasonable time prior to submission to the Court, in the normal manner applicable to the presentation of any motion or application to the Court. The parties shall jointly file in the United States Supreme Court a motion and stipulation asking that the current pending petitions for writs of certiorari be held in abeyance during the settlement procedures, to be dismissed immediately after the Final Order Date.

Plaintiffs shall prepare an alphabetical list of all class members' names. One copy of the notice shall be sent by first-class U.S. mail to each class member.

The costs of notifying the class, including the preparation and reproduction of notice forms, class lists, purchase of envelopes, postages, handling and mailing, shall be borne by plaintiffs, to be recovered only if and when the Court authorizes reimbursement out of the settlement funds.

After notice has been distributed to class members and after hearing has been held pursuant thereto, plaintiffs and TWA will apply to the Court for an order which approves this Settlement Agreement and dismisses these cases against TWA. Plaintiffs will seek an order which is final and appealable under Rule 54(b), F.R.C.P.

If the Court enters an order in accordance with the foregoing, the Final Order Date, as that term is used in this Agreement, shall be:

A. If no valid notice of appeal is filed within the time prescribed in Rule 4(a), Federal Rules of Appellate Procedure, the date on which the time for filing the notice of appeal expires thereunder.

B. If a valid notice of appeal is filed, the date on which such appeal is dismissed or, if the appeal is not dismissed, the date on which an order is entered which affirms the District Court's approval of the settlement plus the expiration of time or the occurrence of judicial events which render such order no longer subject to review or modification.

If the District Court enters an order disapproving of this Settlement Agreement and said order is not thereafter reversed or modified so that approval is otherwise obtained, this Agreement shall be null and void and shall have no force or effect.

XI. RETURN OF DOCUMENTS

Within (30) days after the Final Order Date, all documents now in the document depository which were obtained from TWA shall be returned to TWA.

XII. QUITTANCE PAPERS

Within seven (7) days after the Final Order Date, plaintiffs will deliver to TWA a general release in the form attached hereto, signed by one or more of the class representatives on behalf of all class members, witnessed by two of the lawyers who are of record representing plaintiffs in this case, and acknowledged by a notary public. In addition, TWA shall have the right to include on the check mailed to each member of the class a general release, and the execution of such release by the class member shall be a condition precedent to the right of the class member to receive any remuneration under this Settlement Agreement.

XIII. EXCLUSIVITY

Nothing contained in any other agreement or writing and no right or obligation which has arisen or accrued

outside of this Settlement Agreement (including prior, current and future labor agreements) shall be deemed to modify, change or diminish the rights and obligations which arise under this Agreement.

XIV. ENFORCEMENT OF THIS AGREEMENT

The Order of the District Court approving this settlement shall incorporate and adopt by reference the terms of this Agreement. This Agreement shall be enforceable in the United States District Court for the Northern District of Illinois by virtue of the powers of said Court to enforce its orders and judgments, in addition to any and all other rights and remedies which plaintiffs may have under the common law and statutes of the United States.

Dated this 18th day of June, 1979.

GARDNER, CARTON & DOUGLAS,
Attorneys for
TRANS WORLD AIRLINES, INC.

BY: /s/ Laurence A. Carton

TRANS WORLD AIRLINES, INC.

BY: /s/ David J. Crowley

Ulrich V. Hoffman, an officer of Trans World Airlines, Inc., hereby certifies that the above-named signators have the authority to execute this agreement on behalf of Trans World Airlines, Inc.

/s/ Ulrich V. Hoffman

/s/ Pamela Dailing Giovanelli
PAMELA DAILING GIOVANELLI
Individually and on behalf of
the Plaintiff Class

This 21 day of June, 1979, PAMELA DAILING GIOVANELLI appeared before me, a person authorized to administer oaths in and for the County of Pima, State of Arizona, and acknowledged that she executed the foregoing agreement by affixing her signature thereto at the place indicated above.

/s/ Kenneth S. Walker

[SEAL]

/s/ Anne B. Zipes
ANNE B. ZIPES
Individually and on behalf of
the Plaintiff Class

This 25 day of June, 1979, ANNE B. ZIPES appeared before me, a person authorized to administer oaths in and for the County of West, State of New York, and acknowledged that she executed the foregoing agreement by affixing her signature thereto at the place indicated above.

by /s/ Doris J. Allen
DORIS J. ALLEN
Notary Public

[SEAL]

/s/ Pat Santini
PAT SANTINI
Individually and on behalf of
the Plaintiff Class

This 19th day of June, 1979, PAT SANTINI appeared before me, a person authorized to administer oaths in and for the County of Marin, State of California, and acknowledged that she executed the foregoing agreement by affixing her signature thereto at the place indicated above.

/s/ Jean Cox-Treverton

[SEAL]

One of the Attorneys for
Plaintiffs

One of the Attorneys for
Plaintiffs

PRESSMAN & HARTUNIAN, CHTD.
Suite 4005
55 East Monroe Street
Chicago, Illinois 60603
(312) 372-6475

ARNOLD I. SHURE
Attorney at Law
10 South LaSalle Street
Chicago, Illinois 60603
(312) 346-4537

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 77-1325

In re:
CONSOLIDATED PRETRIAL PROCEEDINGS IN THE AIRLINE CASES

Appeal of:
AMERICAN AIRLINES, INC., and
TRANS WORLD AIRLINES, INC.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Nos. 70 C 2069, 70 C 2071, 72 C 498, 74 C 2063 and 74 C 2762—FRANK J. MCGARR, *Judge*

Argued January 26, 1978—Decided August 24, 1978

Before FAIRCHILD, *Chief Circuit Judge*, PELL and SPRECHER,* *Circuit Judges.*

---

* Although Judge Sprecher heard oral argument, he later disqualified himself from any participation in the decision, and preparation of the opinion, in this case.

PELL, *Circuit Judge.* This is an interlocutory appeal under 28 U.S.C. § 1292(b) of two district court orders. Pretrial proceedings in the district court involved consolidated Title VII [1] class action suits by female flight cabin attendants against American Airlines, Inc. and Trans World Airlines, Inc. (TWA). Subsequent to the filing of this appeal, American entered into a settlement agreement which was challenged and approved on appeal. *Airline Stewards and Stewardesses Association, Local 550* v. *American Airlines, Inc.*, No. 77-2098 (7th Cir. Mar. 14, 1978).

THE OCTOBER 18, 1976 ORDER

TWA thus remains as the only appellant and appeals from the district court's summary judgment order of October 18, 1976, which held TWA's "motherhood" restrictions prior to October 1970 to be a violation of § 703 (a) of the Civil Rights Act, 42 U.S.C. § 2000e-2(a).[2] Specifically, TWA maintained a policy of removing female flight cabin attendants from flight duty while pregnant, and thereafter if a child was born. This policy also extended to female flight cabin attendants who

---

[1] Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

[2] This section provides:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

adopted a child. These employees who became mothers either by childbirth or by adoption were terminated permanently unless they were willing to accept employment in ground duty positions. This policy, however, did not apply to their male counterparts. Male cabin attendants, designated "pursers" by TWA, could remain on flight duty after becoming a parent. Although pursers served on international flights, their responsibilities were substantially the same as those of female flight cabin attendants.[3]

TWA challenges the summary judgment on the grounds that: (1) its policy was not gender-based and therefore did not constitute sex discrimination: (2) its policy did not have a discriminatory effect; and (3) if the policy did discriminate on the basis of sex, the discrimination was a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of TWA's business.[4]

To clarify the challenged portion of TWA's policy, the plaintiff class does not challenge that aspect of TWA's policy which removed female flight cabin attendants from flight duty when they became pregnant. Furthermore, the district court's order, by reference to an earlier order involving American Airlines, specifically stated that this aspect of the policy was not discriminatory. *See Condit* v. *United Air Lines*, 558 F. 2d 1177 (4th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3581 (Mar. 21, 1978). At issue then is only the policy of requiring fe-

---

[3] *See Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 439-42 (D.C. Cir. 1976), *cert. denied*, 46 U.S.L.W. 3527 (Feb. 21, 1978).

[4] 42 U.S.C. § 2000e-2(e) provides in pertinent part:

> [i]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

male cabin attendants who become mothers to resign or accept ground duty positions while not imposing similar restrictions on their male counterparts who become fathers.

In arguing that its policy was not gender-based, TWA relies on *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), in which the Supreme Court held that General Electric's disability benefit plan did not violate Title VII even though it failed to cover pregnancy-related disabilities. To draw support for its argument from *Gilbert*, TWA appears to focus on the maternity leave aspect of its policy and to minimize addressing the only portion of the policy that is at issue, the no-motherhood restriction. *Gilbert* clearly provides no support for the proposition that TWA's no-motherhood policy withstands Title VII scrutiny.

TWA's no-motherhood policy in our opinion provides a clear example of sex discrimination prohibited by § 2000e-2(a). The Supreme Court, in applying that provision, has held that an employer may not refuse to hire women with pre-school-age children while hiring men with such children. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971). TWA's policy discriminated in the same manner.

TWA next argues that its policy did not have a discriminatory effect. This argument is relevant. In Title VII cases, discriminatory effect becomes an issue when the employer has a facially neutral practice. In those cases, the plaintiffs can establish a prima facie case by proving that the practice has a discriminatory effect. *See Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977). We need not reach that issue in the present case because TWA's policy was discriminatory on its face.

Finally, TWA argues that if its policy did discriminate on the basis of sex, the discrimination was a BFOQ rea-

sonably necessary to the normal operation of TWA's business. The BFOQ, often described as an exception to Title VII's general prohibition of sex discrimination, is, at least in the view of one commentator, more accurately designated as a justification for sex discrimination.[5] TWA argues that its no-motherhood policy, albeit discriminatory, was justified as a BFOQ because (1) mothers of young children would have unacceptably high rates of absenteeism, (2) mothers might be subject to overriding domestic concerns that would make them questionable risks for competent performance in times of crisis, and (3) mothers returning from maternity leaves of absence would require expensive retraining.

Our analysis of the BFOQ issue must begin with the Supreme Court's most recent pronouncement in *Dothard* v. *Rawlinson, supra* at 334.

> We are persuaded—by the restrictive language of § 703(e) [§ 2000e-2(e)], the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.

The Court, in a footnote, also stated that the EEOC's narrow construction of the statute, 29 C.F.R. § 1604.2 (a), can be given weight, 433 U.S. at 334 n. 19. The lower court interpretations of the BFOQ prior to *Dothard* are not entirely consistent.[6] In view of the Supreme

---

[5] For a thorough discussion of the legislative history and the current judicial interpretations of the BFOQ, see Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 Tel.L. Rev. 1025, 1027-33, 1042-50 (1977).

[6] *Compare Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969), *with Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). *See also Usery* v. *Tamiami Trail Tours Inc.*, 531

Court's recent approbation of "an extremely narrow construction, we are of the opinion that the Ninth Circuit's construction is the most appropriate. In *Rosenfeld* v. *Southern Pacific Co.*, 444 F. 2d 1219 (9th Cir. 1971), that court stated that

> based on the legislative intent and on the Commission's interpretation, sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception.

444 F. 2d at 1225. Thus, attributes that are culturally more common to one sex than the other are an insufficient basis for a BFOQ. Cultural stereotypes should not be employed to justify sex discrimination.

With this background, we now turn to the three issues which TWA argues present genuine issues of material fact on the BFOQ issue sufficient to defeat summary judgment. First, TWA argues that mothers, but not fathers, of young children would have an unacceptably high rate of absenteeism. They submit that absenteeism is a serious problem among flight attendants. This alone, of course, does not address the critical issue of whether female parents have a sexual characteristic different than male parents which would cause them to be absent more often. TWA, in an attempt to raise a genuine issue of material fact, points to the deposition of David J. Crombie, Vice-President of Industrial Relations at TWA, which states that problems of absenteeism have been exacerbated since TWA permitted mothers on flight duty. This is insufficient to defeat summary judgment because he does not attribute the increased absenteeism problem directly to the mothers. Indeed, he presents no evidence

---

F.2d 224 (5th Cir. 1976). A perceptive analysis of these cases, as well as a comprehensive survey of developments in Title VII jurisprudence, is provided in Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, 1977 U. Ill. L. F. 69.

nor even states that mothers were absent more often than fathers, information, if it exists, that surely would be available to him.[7] TWA, in its brief, can only state that "[t]he airlines *could not be sure* that absenteeism among flight attendants with young babies would not increase greatly." [Emphasis added.] The whole tenor of its argument is speculative and relies heavily on stereotypical assumptions, a posture which is anathema to the maturing state of Title VII analysis.

TWA next argues that it raised a genuine issue of material fact as to a BFOQ in its allegation that mothers might be subject to overriding domestic concerns that would make them questionable risks for competent performance in times of crisis. In support of this allegation TWA primarily offers affidavits of Dr. L. G. Lederer, Corporate Medical Director of American Airlines, Dr. Charles C. Gullett, Corporate Director Medical Services & Safety Engineering for TWA, and the deposition of David J. Crombie.

Dr. Lederer's affidavit states that a mother's concern for her child, when combined with irregular hours and absences from home at distant locations, would produce psychological stresses which could impair the proper performance of her flight duties. This is insufficient to defeat summary judgment because he fails to contrast the potential effect on performance with that of fathers, the critical issue in this case. Indeed, within the same paragraph, Dr. Lederer states that frequent absences from home and irregular work hours as experienced by *firemen* and *salesmen* contributed to unstable marriages. Therefore, it is not at all clear that his conclusions regarding effects on performance are gender-related.

---

[7] TWA terminated its no-motherhood policy in October 1970 and thus has had several years to assess the absenteeism problem of mothers *vis-a-vis* fathers, if such a problem exists, and to determine whether it is linked to a sex characteristic.

Dr. Gullett's affidavit includes statements similar to those of Dr. Lederer and accordingly fails to defeat summary judgment for the same reasons. Mr. Crombie's deposition similarly fails to raise a genuine issue of material fact. He stated in a conclusory fashion that "the mother of children *could* be so preoccupied with her cares that she *might* be deficient in the performance of those aspects of her job relating to safe transport. . . ." [Emphasis added.] Aside from our uncertainly as to Mr. Crombie's expertise to make such a judgment, we are not persuaded that his conclusions are not based on sex stereotyping that Title VII seeks to eliminate from the employment setting. As this court stated in *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), § 703(a)(1) "subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past." Furthermore, Mr. Crombie's statements do not address the question of whether mothers have a sex characteristic, different than fathers, that would impair their job performance to a greater extent. Characteristics that might, to one degree or another, correlate with a particular sex are insufficient to provide the basis for a BFOQ. *Rosenfeld* v. *Southern Pacific Co.*, *supra* at 1225. To accept Mr. Crombie's statements as sufficient to raise a genuine issue of material fact requires acquiescence in assumptions steeped in cultural stereotypes, such as that female parents have a more intense concern for their children than male parents, assumptions that are inconsistent with the purposes of the Act.

TWA's third argument to defeat summary judgment is that it raised an issue of fact as to the existence of a BFOQ by its allegation that mothers returning from maternity leaves would require expensive retraining. We are unpersuaded by this argument because it seems clear that the retraining mother returning from maternity

leave, albeit an expense to TWA, would be less expensive than training her replacement.

We have examined all the other relevant affidavits, depositions, and documents in the record and find them of no additional support to TWA's challenge to the district court's summary judgment. Accordingly, for the reasons stated herein, we hold that the district court properly granted summary judgment in favor of the plaintiffs.[8]

THE OCTOBER 15, 1976 ORDER

TWA moved to exclude certain persons from the plaintiff class for lack of subject matter jurisdiction. The class was defined as all female flight cabin attendants who were terminated from employment with TWA on or after July 2, 1965 for reasons of pregnancy.[9] TWA's motion sought to exclude from this class all those employees who were terminated more than 90 days prior to May 31, 1970, the date the original plaintiff class filed

---

[8] Our decision to affirm the summary judgment here may appear inconsistent with language in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1971), where the Court, in vacating and remanding a sex discrimination case stated that "conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the Act." This language, however, does not categorically state that such considerations, if proved, would constitute a BFOQ. Indeed, after *Dothard* v. *Rawlinson*, 433 U.S. 321, 334 (1977), in which the Court accepted an "extremely narrow" construction of the BFOQ, the court may well be unwilling to accept such considerations as sufficient to constitute a BFOQ. Furthermore, in *Phillips*, the defendant did not raise the BFOQ defense in the lower court and thus the issue was not directly before the Supreme Court.

[9] Since the pregnancy leave policy is not challenged, but rather the refusal to reinstate after a child is born, we assume the class includes only those who would have resumed flight duty after becoming a mother but for TWA's policy forbidding this.

its charge with the EEOC. TWA argues that these employees did not fulfill the jurisdictional requirement that a charge must be filed with the EEOC within 90 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(d) (1970 ed.).[10]

The district court denied TWA's motion on the ground that the alleged unlawful employment practice was a "continuing violation" so that even though the termination may have occurred more than 90 days before the plaintiff class filed its charge with the EEOC, the no-motherhood policy, which caused not only termination, but also the failure to reinstate, continued into the 90-day period and itself constituted an unlawful employment practice which continued until TWA abandoned the policy in October 1970.

The continuing violation theory was created to add some flexibility to an otherwise rigid jurisdictional filing requirement that might often result in the denial of Title VII remedies to employees who have suffered employment discrimination. Although the purpose of the theory is admirable, an application of the theory in its broadest terms would vitiate the filing requirement which, as a jurisdictional prerequisite, also deserves proper respect. Accordingly, we must define the legitimate scope of this theory and determine whether TWA's conduct falls within it.

Courts which have applied the continuing violation theory have not addressed the precise issue in the present case. In *Cox* v. *United States Gypsum*, 409 F. 2d 289 (7th Cir. 1969), several female employees were laid off more than 90 days prior to filing charges with the

---

[10] In 1972, this section was amended to extend the time limit to 180 days and was renumbered § 2000e-5(e). The amendment does not apply to the present case because these proceedings were initiated in 1970.

EEOC. They claimed a continuing violation on the basis that male personnel were hired to perform jobs which the plaintiffs were qualified to perform between the time plaintiffs were laid off and the time they filed their charges. This court held that although a charge filed more than 90 days after a layoff would be untimely, the plaintiffs' allegations suggested discriminatory recalls sufficient to show that the violation continued up to the filing of charges. 409 F. 2d at 290. *Accord, Macklin* v. *Spector Freight Systems*, 478 F. 2d 979 (D.C. Cir. 1973). *See also Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F. 2d 1186, 1189 (7th Cir. 1971), *cert. denied*, 404 U.S. 939.

When the alleged unfair employment practice culminates in termination of employment rather than a layoff, courts have been unwilling to apply the continuing violation theory. In *Terry* v. *Bridgeport Brass Co.*, 519 F. 2d 806 (7th Cir. 1975), the plaintiffs filed their EEOC charge more than eleven months after they were terminated. This court, quoting an opinion of the Eighth Circuit, stated that

> to construe loosely "continuing" discrimination would undermine the theory underlying the statute of limitations. While the continuing discrimination theory may be available to present employees, . . . even though on layoff, . . . we do not think this theory has validity when asserted by a former employee.

519 F. 2d at 808. For this reason the court held that the EEOC charges were untimely filed and that the court consequently lacked jurisdiction.

The present case is distinguishable from *Cox* because it does not involve layoffs and from *Terry* because *Terry* did not involve the continuation of an articulated policy denying reinstatement for statement for discriminatory

reasons.[11] It is also distinguishable from the Supreme Court's recent opinion in *United Air Lines* v. *Evans*, 431 U.S. 553 (1977). In *Evans*, the plaintiff was terminated in 1968 because of United's no-marriage rule. United discontinued the rule in 1969 and the plaintiff was hired as a new employee in 1972. In 1973, she filed charges with the EEOC and argued that her employment in 1972 without seniority continued the discriminatory effects of the original termination. The Court responded that the hiring practices in 1972 were not discriminatory and that these hiring practices merely gave some present effect to past discrimination. Such "present effect" is not enough to state a claim under Title VII, however, and the Court stated that "the critical question is whether any present *violation* exists." 431 U.S. at 558 (emphasis in original). Whether any present violation would have existed had the plaintiff filed while the no-marriage policy was still effective or within 90 days of its discontinuation, was not decided and, in essence, is the issue before us now.[12]

Although, as we have indicated, there are no cases directly on point, we are unwilling to extend the continuing violation theory, as did the district court, so as to

---

[11] This latter question of whether the continuation of a discriminatory policy which denies reinstatement constitutes a continuing violation was specifically left open by the Ninth Circuit. In *Collins* v. *United Air Lines, Inc.*, 514 F.2d 594 (9th Cir. 1975), the plaintiff was forced to resign under a "no-marriage" policy. The policy was then changed and three years later the plaintiff filed a charge with the EEOC. The court held the filing untimely, but specifically stated that it expressed no opinion concerning whether a charge filed within 90 days of the discontinuance of the no-marriage policy would have been timely. 514 F.2d at 596 n.2.

[12] Neither the EEOC nor the courts have construed *Evans* as eliminating entirely the continuing violation theory. *See* EEOC Interpretative Memorandum, 46 U.S.L.W. 2028 (July 19, 1977); *Caldwell* v. *Seaboard Coastline Railroad*, 435 F. Supp. 310 (W.D.N.C. 1977).

include in the plaintiff class those employees who were permanently terminated more than 90 days before the filing of EEOC charges. We attach significant weight to that point in time when the employment relationship is permanently severed, and we are not alone in this regard. In *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), the court stated in a similar Title VII class action context that

> [a] severing of the employment relationship ordinarily terminates a discrimination against the severed employee, and activates the time period for filing charges with the Commission concerning any violation which occurred at separation or which may have been continuing up to the date thereof. To hold otherwise would effectively read the timely-filing requirement out of the statute.

567 F.2d at 473. *Accord, Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Terry* v. *Bridgeport Brass Co.*, *supra* at 808; *Collins* v. *United Air Lines, Inc.*, 514 F.2d 594, 596-97 (9th Cir. 1975). Arguably, the source for the continuing violation is not the termination itself, but the subsequent refusal to reinstate because of the same policy that led to the initial termination. We are of the opinion, however, that the terminations in the present case, which occurred pursuant to a policy which explicitly included a refusal to reinstate, are not meaningfully different than discriminatory terminations which do not articulate a policy of refusing reinstatement. In most cases in which an employee is discharged for discriminatory reasons, his or her opportunity for reinstatement is generally foreclosed for the same discriminatory reasons, but courts have required that employee to file an EEOC charge within 90 days after the termination. The addition of an articulated policy precluding reinstatement should not require a different rule. Therefore, it is the

continuity of the employment relationship that sustains the violation, and when that relationship is severed, the violation ceases.

Those employees in the present case who were terminated but reinstated in ground duty positions after their maternity leave pursuant to TWA's policy, are in a different position. These employees were properly included in the class because they were subject to a continuing violation. When they resumed employment after becoming a mother, the discriminatory violation, which lay dormant during their pregnancy, was revived; that they were forced to accept a presumably less preferable ground duty position while new employees were hired for flight duty revived the violation and rendered it as to them a continuing one. The position of these employees is closely analogous to the layoffs followed by discriminatory recalls held to be continuing violations in *Cox* and *Macklin*, both *supra*. It is also analogous to a discriminatory failure to promote, held to be a continuing violation in *Clark* v. *Olinkraft, Inc.*, 556 F.2d 1219, 1223 (5th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3527 (Feb. 21, 1978). *See also Caldwell* v. *Seaboard Coastline Railroad*, 435 F. Supp. 310 (W.D.N.C. 1977). Every time TWA hired a new flight cabin attendant, instead of transferring one of the former stewardesses now on ground duty, it perpetuated the initial violation.

The distinction we have drawn between those terminated employees who returned to employment in ground duty positions and those who did not renew the employment relationship is a delicate but nonetheless important one. The returning employee remains within the ambiance of a continuing relationship of employment and supervision and thus is directly subject to the employer's discriminatory actions. The non-returning employee is outside this ambiance and thus feels at most only the indirect reverberations of those actions. Although the non-

returning employee who did not desire to remain as a TWA employee in a non-flight position may arguably suffer some form of discrimination whenever the employer hires a new flight cabin attendant instead of reinstating the terminated employee, the discriminatory impact is diffuse and uncertain. Permanent severance of the employment relationship destroyed the ties through which the direct impact of discrimination may be transmitted.

TWA points out with some cogency the inherent difficulties of determining back pay if all members of the class were found entitled to prove what TWA characterizes as "these stale claims": each claim will require adjudication of whether termination was for any reason other than discrimination; a claimant may not recover if she was guilty of concealment of pregnancy; she may not recover if she left work for family reasons; amounts earned or earnable with reasonable diligency by each claimant in other work during recoverable years must be determined in order to reduce back pay under the express provisions of § 706(g); and the evidence concerning the individual and personal facts of hundreds of these claims is sure to be vague and unreliable.

While all of these aspects may be true, we do not deem that difficulty of ascertainment per se is a ground for denying relief where it is legally due. Nevertheless, we cannot put this factor entirely aside in determining the Congressional intent in requiring claims to be litigated only if filed with the EEOC within 90 days after the alleged unlawful employment practice occurred.

We hold therefore that the class members who satisfy the jurisdictional 90 days filing requirement are those employees who were terminated permanently[13] during

---

[13] The proper time for the 90-day period to begin to run is the time of *permanent* termination. Although TWA argues other-

the 90 days prior to the filing of EEOC charges and those employees who were removed from flight duty on or after July 2, 1965 and before the filing of EEOC charges but who were reinstated in ground duty positions and who continued their employment into the 90-day period. While we might rather safely assume that those employees who returned to work in a ground capacity would have preferred to reassume the literally and figuratively higher status of cabin attendants, nevertheless it is not a necessarily true conclusion and therefore these employees must also show that during the 90-day period they were qualified to and would have accepted flight duty had it not been for TWA's policy.

As to those employees who have failed to file timely charges with the EEOC, who were terminated more than 90 days before filing of EEOC charges and who did not resume employment in ground duty positions, we must now consider whether the employer waived this timeliness defense by failing to plead it affirmatively in its answer. There is no dispute that the employer failed to raise this issue in the pleadings. The critical issue is whether the 90-day period is in the nature of a statute of limitations in which case the doctrines of waiver and estoppel would apply, or is a jurisdictional prerequisite to suit in which case the employer could raise it at any time.[14] We hold the 90-day filing period to be jurisdictional and therefore the employer's failure to plead it did not constitute a waiver.

---

wise, we interpret the effect of its policy as resulting in permanent termination when a child was born or adopted. Prior to that time the severance from employment was in actuality a mandatory maternity leave. This is apparent from the fact that a pregnant employee was free to resume employment in flight duty after a miscarriage or in ground duty after childbirth.

[14] Fed. R. Civ. P. 12(h)(3); *United States* v. *Griffin*, 303 U.S. 226, 229 (1938).

The language of the statute is clear:

> A charge under subsection (a) of this section *shall be filed* within ninety days after the alleged unlawful employment practice occurred.

42 U.S.C. § 2000e-5(d) (1970 ed.) (emphasis added).[15] Furthermore, having examined the legislative history of this provision, of which there is very little, we find nothing of significance to indicate that the 90-day filing requirement is not jurisdictional. *But cf. Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 475 n. 345 (D.C. Cir. 1976). In *Terry* v. *Bridgeport Brass Co., supra*, the plaintiffs' Title VII suit was dismissed in the district court because they failed to file charges with the EEOC within 90 days of the alleged unfair employment practice. On appeal, this court affirmed the dismissal stating that "[t]he district court therefore correctly concluded that the charges were untimely filed and that it consequently lacked jurisdiction." 519 F.2d at 808.[16] Moreover, the

---

[15] *See* note 10 *supra*.

[16] *See also Gibson* v. *Kroger Co.*, 506 F.2d 647, 650 (7th Cir. 1974), *cert. denied*, 421 U.S. 914 (1975); *Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 821 n.6 (7th Cir. 1972); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 718 (7th Cir. 1969); *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968).

Other circuits are split on this issue. *See, e.g., Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 475 (D.C. Cir. 1976); *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd per curiam by an equally divided Court*, 46 U.S.L.W. 4021 (Nov. 29, 1977); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 n.8 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *East* v. *Romine, Inc.*, 518 F.2d 332, 336-37 (5th Cir. 1975); *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928-29 (5th Cir. 1975); *Olson* v. *Rembrandt*, 511 F.2d 1228, 1231 (8th Cir. 1975).

Olson was the 8th Circuit case quoted in *Terry*. We have earlier in this opinion quoted from *Terry* in connection with the discussion of the continuing violation issue. We note that the 8th Circuit did refer to "the statute of limitations" in the *Olson* opinion. *Terry*, however, clearly proceeded on the basis of jurisdiction.

Supreme Court has, on several occasions, referred to the 90-day filing requirement as a jurisdictional prerequisite. *See United Air Lines, Inc.* v. *Evans*, *supra* at 555 n.4; *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973). Therefore, the employer's failure to raise the filing requirement earlier does not constitute a waiver, nor is the employer estopped from raising it.

The plaintiffs argue that the employer's statements at a March 17, 1972 settlement hearing constitute an express waiver of the filing requirement issue. Although it is questionable whether any concessions made at a settlement hearing should be held to constitute a waiver when the settlement is subsequently overturned, we need not reach this question as our conclusion that this filing requirement was jurisdictional precludes a finding of waiver.

Plaintiffs also argue that the employer should be estopped from raising the filing requirement because the employer failed to raise it during the many lengthy proceedings which preceded the employer's motion to amend its answer to raise the issue. Plaintiffs characterize this conduct as "playing fast and loose with the courts," and contend that such conduct is grounds for estoppel. We do not condone the employer's delay in raising the jurisdiction issue, but neither do we accept the plaintiffs' argument that the delay should estop TWA from raising subject matter jurisdiction. The cases plaintiffs cited in support of their estoppel theory either did not involve subject matter jurisdiction, *Alger* v. *Hayes*, 452 F.2d 841 (8th Cir. 1971), or involved a situation in which the defendant pleaded lack of jurisdiction in its answer, then filed a stipulation admitting jurisdiction, and then two years later, after the statute of limitations had run on the plaintiff's claim, attempted to raise the same jurisdiction issue it initially pleaded. *DiFrischia* v. *New*

York Central Railroad Co., 279 F.2d 141 (2d Cir. 1960).[17] None of these cases, therefore, supports an estoppel argument in the present case.

Accordingly, for the reasons stated here, we vacate the October 15, 1976 order and remand to the district court for further proceedings consistent with this opinion. The parties shall bear their respective costs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

---

[17] This case has been limited in its application to its unusual facts. *See, e.g., Joyce* v. *United States*, 474 F.2d 215, 218 n.1 (3d Cir. 1973).

RELEVANT EXCERPTS FROM TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e ET SEQ.

Section 703(h), 42 U.S.C. § 2000e-2(h):

> Notwithstanding any other provisions of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

Section 706(d), 42 U.S.C. § 2000e-5(d) (1970):*

> A charge under this section shall be filed within ninety days after the alleged unlawful employment practice occurred. . . .

Section 706(g), 42 U.S.C. § 2000e-5(g):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . .

---

* The time period is now 180 days and is found in § 706(e) under the 1972 amendments.

EXCERPTS FROM ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES

ARTICLE III.—THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * *

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between

a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

RULE 82 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93.

RULE 23(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

RULE 16(e) OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(e) Rehearings Sua Sponte Before Decision. A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the

position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule of procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

> This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or A majority did not favor) a rehearing in banc on the question of (e.g., overruling Doe v. Roe).

EXCERPTS FROM THE COLLECTIVE BARGAINING AGREEMENT BETWEEN TRANS WORLD AIRLINES, INC. AND THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, SIGNED OCTOBER 11, 1978

ARTICLE 20

SENIORITY GENERAL

(A) Seniority shall begin to accrue from the date of employment as a Flight Attendant and shall continue to accrue during such period of employment as a Flight Attendant except as otherwise provided in this Agreement. When Flight Attendants have equal seniority, their relative seniority shall be determined on the basis of their length of employment with the Company, or if the length of their Company employment is equal then their surname shall be listed in order of age as determined by date of birth as shown in the Company's personnel records (the oldest of them being listed first, the next oldest second, etc.). As to those Flight Attendants who are assigned to the line on or after July 1, 1976, if the length of Company employment is equal as between two Flight Attendants, then

their surname shall be listed upon the seniority list on the basis of the last four (4) digits of the Flight Attendants social security number, with the Flight Attendant with the lowest last four (4) digits being deemed the senior.

(B) Seniority shall govern all employees in case of furlough due to reduction in forces, re-employment after furlough, (subject to Article 12(G)) choice of vacancies, and preference of assignment to equipment, provided the employee is deemed sufficiently qualified by the Company for the operation involved, except that the term "sufficiently qualified" as used herein shall be applied the same as it was on July 31, 1969. In addition, qualifications or lack thereof on any equipment will not be used as a basis for denying seniority in cases of bidding or reduction in force. If a Flight Attendant bids and is awarded a line of time on equipment on which such Flight Attendant is not qualified, the provisions of Articles 6-A(F) or 6-B(G) will apply during such training. In the event a senior employee is not considered sufficiently qualified, the Company will, upon request, discuss the matter with the employee and furnish reasons therefor, in writing.

* * * *

(F) Any employee who resigns or who is dismissed from the service of the Company shall thereupon forfeit all previously accrued seniority, and the employee's name will be removed from the seniority list(s).

ARTICLE 12

REDUCTION IN FORCE AND RECALL

(F) Employees furloughed due to a reduction in force on return to duty within three (3) years from the furlough date, shall be allowed, for seniority pur-

poses but not for purposes of determining future pay rate, all time accrued prior to returning to duty. At the end of three (3) years after the date of furlough, the furlough shall expire and the employee's name shall be removed from the seniority list(s).

(G) Flight Attendants who have been furloughed or displaced or who have displaced into a lower classification will be recalled in seniority order to the classification from which furloughed or displaced prior to the processing of all other bids on file. Furloughed Flight Attendants shall, upon notice of recall, indicate in order of preference those domiciles to which they will accept assignment. Assignments to domiciles will then be made in seniority order from among those Flight Attendants being recalled and those Flight Attendants who have standing bids on file. The priority of recall to the classification(s) will apply only to the first available vacancy offered in the classification(s) to the furloughed or displaced employee.